

1 UNITED STATES BANKRUPTCY COURT
2 SOUTHERN DISTRICT OF NEW YORK
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5 In the Matter of:

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7 GAWKER MEDIA, LLC, Case No. 16-11700-smb

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9 Debtor.
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13 U.S. Bankruptcy Court
14 One Bowling Green
15 New York, New York 10004
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17 April 9, 2018
18 10:05 AM
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20 B E F O R E :
21 HON STUART M. BERNSTEIN
22 U.S. BANKRUPTCY JUDGE
23
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1 Hearing re: Motion in Limine

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3 Hearing re: Motion of Ryan Goldberg (I) to Enforce Order

4 Confirming Amended Joint Chapter 11 Plan of Liquidation and

5 (II) to Bar and Enjoin Creditors from Prosecuting their

6 State Court Action

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1 P R O C E E D I N G S

2 THE COURT: Gawker Media?

3 MS. BIERUT: Your Honor, Elizabeth Bierut on
4 behalf of the plan administrator.

5 THE COURT: Okay.

6 MS. BIERUT: Your Honor, we have two matters going
7 forward today, neither which are filed by the debtor, but
8 the first is a motion in limine to exclude the movant's
9 expert, which was filed by R.J. Bell (indiscernible), and
10 the second is the motion of Ryan Goldberg to enforce the
11 order confirming the plan and to bar and enjoin creditors
12 from prosecuting the State Court action.

13 THE COURT: Okay. I'll hear the motion in limine
14 first.

15 MR. ESPER: Good morning, Your Honor. Dilan Esper
16 for the moving party, and most of what we wanted to say
17 about this is covered in the papers, so I don't think a long
18 argument is necessary, I just wanted to hit two key points.

19 THE COURT: Go ahead.

20 MR. ESPER: One, Mr. Milton just has no relevant
21 expertise, he's never dealt with an insurance policy that
22 has a gross negligence or willful misconduct exclusion. He
23 has no idea how, even if we took the analogy as it were
24 between what the insurance companies do and what is at issue
25 with this case with the bankruptcy plan, he has no idea how

1 an insurance company would interpret a policy that said
2 gross negligence and willful misconduct.

3 And the other thing I would say is that he's
4 really at bottom his testimony is just an attempt to vary
5 the terms of the plan and read the language of gross
6 negligence and willful misconduct out of the plan, which is
7 not something that I think is an appropriate subject for
8 expert testimony.

9 If Your Honor just has any questions I can answer
10 them.

11 THE COURT: Thank you.

12 MR. HENTOFF: Your Honor, Thomas Hentoff for Ryan
13 Goldberg.

14 I think that movant's argument really goes to
15 cross-examination regarding Mr. Milton's testimony.

16 THE COURT: But what's he going to tell me that's
17 relevant to the issues I have to decide?

18 MR. HENTOFF: Well the Court has asked for
19 information about the parties' understandings with regard to
20 the language --

21 THE COURT: An expert certainly can't testify
22 about the subjective understandings of the parties.

23 MR. HENTOFF: Your Honor, the expert cannot
24 testify to the subjective understanding, but an expert can
25 testify to an industry that has specialized knowledge about

1 an industry's custom and practice, and Mr. Milton is an
2 expert in the area of media liability insurance. And as we
3 said in our opposition brief, when media companies provide
4 indemnification to their writers a primary way in which they
5 do it is to provide the insurance coverage that the media
6 liability insurers provide.

7 And Mr. Milton has over 40 years of experience in
8 this field and he knows what -- that kind of
9 indemnification, he knows what it covers, and it does cover
10 the very kind of intentional conduct that the plaintiff's
11 are arguing is carved out.

12 THE COURT: But he's also going to testify that
13 he's never seen a U.S. policy that has these exclusions, and
14 obviously the plan has these exclusions. So it's got to be
15 something different.

16 MR. HENTOFF: Well that -- but that's -- the fact
17 that he's never seen that is actually very important to his
18 testimony, because that kind of a language it helps the
19 Court have some background to know that the kind of language
20 that's in the policy cannot apply to the very kinds of
21 defamation claims that the plaintiffs say cause an
22 exclusion.

23 THE COURT: But isn't this essentially a contract
24 case? I've seen the emails going back and forth and the
25 parties were negotiating over the language of 9.05 as well

1 as 9.02, and the question is, you know, what do they mean?

2 MR. HENTOFF: Yes, but courts in the Southern
3 District of New York have held that in helping a court
4 understand the meaning of a contract the customs and
5 practice in an industry is both relevant and is a proper
6 subject of expert testimony.

7 THE COURT: But there's no evidence that they're
8 even focused on the insurance policies when they were
9 negotiating this. I grant you they were focusing on the
10 debtor's obligations to indemnify, but I haven't seen a
11 debtor insurance policy or -- you know, I don't even know if
12 the insurance has to do with this. They may be insured for
13 this particular defamation claim, whether or not its exclude
14 from the -- you know, under the plan.

15 MR. HENTOFF: Sure, Your Honor. So the expert
16 testimony about custom and practice in this industry helps
17 shed light on what the expectations of at least one side of
18 this were, the writers who gave up their indemnification
19 rights.

20 THE COURT: You know it's a matter of contract
21 law, unspoken secret understandings are not relevant to
22 interpreting a contract.

23 MR. HENTOFF: Your Honor, we've got a couple of
24 terms in this agreement. These terms are --

25 THE COURT: These terms are in every plan I've

1 ever seen by the way.

2 MR. HENTOFF: Right, Your Honor, but these terms
3 -- in terms of the mission that the indemnification provides
4 I think it's helpful for the Court to hear from an expert in
5 media liability insurance, which is the exact kind of
6 indemnification that we're talking about here. And of
7 course the Court is well, you know, able to weigh the
8 testimony and ask questions.

9 THE COURT: All right.

10 MR. HENTOFF: Thank you, Your Honor.

11 THE COURT: Thank you.

12 I'm going to grant the motion and exclude the
13 testimony. I don't have any question about Mr. Milton's
14 qualifications, I'm satisfied that he is qualified as a
15 specialist in the field of media liability insurance.

16 In substance he's going to testify that media
17 policies insure against liability, against lawful
18 misconduct, including actual malice, gross, negligence,
19 intentional torts, and even punitive damages, but Mr. Milton
20 has never seen a U.S. policy that excludes coverage for
21 these types of claims and such exclusions he will opine
22 would render the coverage illusory.

23 He states, or at least implies, that the release
24 language in Section 9.05 would expressly exclude willful
25 misconduct -- which expressly excludes willful misconduct

1 and gross negligence, does not exclude defamation claims.

2 As I indicated, the testimony is not relevant.

3 The Court is interpreting a plan, not an insurance policy,
4 and the protections provided through the third-party release
5 are obviously less extensive than the scope of insurance
6 coverage. For example, media liabilities do not contain
7 exclusions for willful misconduct and gross negligence, but
8 Section 9.05 does, and it must mean something.

9 The Court's role is that of a gatekeeper to decide
10 whether the plan releases the claims asserted in the State
11 Court complaint, not whether an insurance policy would cover
12 those claims.

13 Finally, the Court does not require Mr. Milton to
14 interpret the plan. The language of Section 9.05 was
15 negotiated between the attorneys for the debtors and the
16 writers, and will be interpreted in accordance with the
17 principles that govern the interpretation of a contract.

18 So you can submit an order granting the motion.

19 All right. Is Mr. Goldberg prepared to call his
20 first witness or do you want to make an opening statement?

21 MS. LEVINE: Your Honor, if we could just a very
22 briefly opening statement.

23 THE COURT: Sure.

24 MS. LEVINE: But also can we allow Mr. Milton to
25 -- he's got a plane to catch.

1 THE COURT: Oh, he's certainly excluded, yes.

2 MS. LEVINE: So you're released.

3 MR. MILTON: Thank you.

4 THE COURT: Okay.

5 MS. LEVINE: And, Your Honor, may I --

6 MR. ESPER: And I have a little housekeeping
7 matter just before -- just to --

8 THE COURT: Every time somebody has a little
9 housekeeping matter it takes a whole day. Go ahead, what's
10 your housekeeping matter?

11 MR. ESPER: I promise, Your Honor, this is
12 something the parties have actually agreed on.

13 THE COURT: Oh, well all right then, I'm certainly
14 not going to get in the way of that.

15 MR. ESPER: Your Honor, normally the order of
16 proof obviously would be that one side would present
17 witnesses and we would cross them and then we would present
18 witnesses. In this case both parties basically are using
19 the same witnesses, the issues are just going to be as to
20 what the testimony is.

21 THE COURT: You want to ignore the usual rules of
22 cross-examination and just question the witnesses as they
23 sit?

24 MR. ESPER: Exactly. No limitation on scope of
25 direct and the part -- my understanding with Mr. Patel is

1 that the parties have agreed to this.

2 THE COURT: All right. That's fine.

3 MR. ESPER: And one other housekeeping matter.

4 THE COURT: Sure.

5 MR. ESPER: Which is just --

6 THE COURT: That was an easy one. Go ahead.

7 MR. ESPER: Yeah. This is an easy one too, I just
8 want to -- and it can be resolved at the end if you want,
9 but I think it would be helpful to the Court if the parties
10 have some opportunity at the end of this to submit some sort
11 of legal contentions, short trial briefs, or proposed
12 findings of fact, whatever.

13 THE COURT: Why don't we leave that for the end
14 and see what the evidence shows.

15 MR. ESPER: Sure. Thank you, Your Honor.

16 MS. LEVINE: Your Honor, actually we'll just call
17 Mr. Gilardi.

18 THE COURT: Okay. Mr. Gilardi, would you raise
19 your right hand, please.

20 GREG H. GILARDI, WITNESS, SWORN

21 THE CLERK: Okay. Please speak into the
22 microphone. Go ahead.

23 DIRECT EXAMINATION

24 BY MS. LEVINE:

25 Q Good morning, Mr. Gilardi, thank you for being here

1 this morning.

2 A Good morning.

3 Q Can you state your name and your firm name for the
4 record?

5 A Sure. It's Greg M. Gilardi, and I work at Ropes & Gray
6 LLP.

7 Q And did Ropes & Gray represent Gawker Media and its
8 related entities in the bankruptcy cases?

9 A Yes, it did.

10 Q Did you personally lead that engagement?

11 A Yes, I did.

12 Q Are you currently still involved in the Gawker
13 bankruptcy cases?

14 A Yes, I am.

15 Q Was Mr. Holden involved in this bankruptcy cases prior
16 to confirmation?

17 A Yes. Mr. Holden was the chief restructuring officer
18 prior to confirmation and the effective date, and then as of
19 the effective date he became the plan administrator.

20 Q And were you involved in the drafting of the plan of
21 reorganization?

22 A Yes, I was.

23 Q Including Sections 9.05 and 9.02?

24 A Yes, I was.

25 Q Do you recall the confirmation hearing date?

1 A December 13th maybe. 12th, 13th.

2 Q Yes, December 13th, 2006.

3 A '16.

4 Q 2016.

5 A '16.

6 Q Was it important to you to confirm the plan prior to
7 the end of the year of 2016?

8 A Yes, it was.

9 Q Was there a tax consequence to that?

10 MR. ESPER: Objection.

11 THE COURT: What's the objection?

12 MR. ESPER: This calls for a legal conclusion as
13 phrased.

14 THE COURT: Well I mean it's his understanding of
15 why -- it informs his understanding of why he wanted to
16 confirm the plan before the end of the year. It's
17 overruled. Go ahead, you can answer the question.

18 THE WITNESS: Yes, there was. There -- in light
19 of the sale approved by this Court and the closing of the
20 sale with Univision there were tax ramifications of trying
21 to close the plan and make distributions under the plan by
22 December 31st, 2016. So we moved as fast as possible to
23 confirm that plan, and then also to make distributions I
24 would say under the plan but with the Court's approval prior
25 to December 31st even though the plan ultimately did not go

1 formally effective until March of 2017.

2 BY MS. LEVINE:

3 Q And as part of the timing that you were looking to
4 achieve was it important -- was it your understanding that
5 it was important to the debtors to resolve disputes that
6 would have led to objections to confirmation?

7 A Yes.

8 Q And did you enter into negotiations with the writers
9 with regard to resolving potential disputes as to
10 confirmation?

11 A Yes. There were discussions -- you were counsel to a
12 series of writers that had filed proofs of claim.
13 Mr. Denton, not a writer, but also had filed proofs of claim
14 and had his own bankruptcy going on. And part of the
15 concerns that we had with respect to making distributions
16 confirming a plan was what we referred to as the
17 indemnification dam.

18 The indemnification dam was that there were a lot of
19 claims for contingent, in most instances claims against, for
20 example, Mr. Denton or claims against Mr. Cook, and I can't
21 remember the other names, so there was an issue as to
22 whether or not and how we would resolve those claims setting
23 up reserves or trying to resolve their claims prior to
24 confirmation so we didn't have to set up reserves. So I
25 entered into negotiations with you as counsel, also with

1 counsel to Mr. Denton, regarding the proper way to treat
2 those claims.

3 Mr. Delario (ph) also had a claim for indemnification
4 based upon the Terry Belaya (ph) litigation, also negotiated
5 with his counsel about a potential resolution of the Delario
6 potential indemnification claims.

7 Q And when you say you, you're referring to Saul Ewing as
8 counsel for --

9 A Saul Ewing, yes. You and Mr. Patel were the lead
10 counsels at Saul Ewing, there was a counsel that represented
11 Mr. Delario and there was a counsel at Cole Schotz that
12 represented Mr. Denton.

13 Q And did those negotiations include negotiations over
14 third-party releases?

15 A Yes. Those negotiations were with respect to not just
16 -- I put them together. It's third-party releases and the
17 injunction provisions that are in the plan, and I believe
18 they're Sections 9.02 and 9.05.

19 Q And at the time of the confirmation hearing were you
20 aware of certain demand letters that had been sent to the
21 debtors from creditors, including creditors that had not
22 filed proofs of claim?

23 A Yes. I mean I had been aware of them. So we sold the
24 company, the company was sold in June. Prior to selling the
25 company to Univision there were a series of demand letters

1 both pre-bankruptcy and post-bankruptcy, and then at the
2 confirmation hearing we were aware that there were still
3 letters outstanding, although I think the last bar date may
4 have passed on December 8th, but there were still
5 outstanding letters that had come in regarding possible
6 claims and causes of action against both Gawker and writers
7 responsible for writing the articles or comments.

8 Q And do you recall whether or not you discussed this
9 particular issue at the oral argument on the confirmation?

10 A Yes, I used I think at least one example that I can
11 remember, but for example, I know that we had received a
12 letter with respect to an article written about the then
13 President Elect Trump, and I did describe that circumstance
14 to His Honor about the fact that we had not received a proof
15 of claim, but that was -- there were a series of letters,
16 and I described that situation and had done so I think
17 previously saying that that was one of the concerns that we
18 had with respect to those people -- the holders of that kind
19 of claim, which had not been filed a proof of claim, but
20 being a concern that they would eventually sue the writers.

21 Q And was it your understanding that the third-party
22 releases in the plan was intended to bar those kinds of
23 claims?

24 MR. ESPER: Objection. That seeks his
25 subjective --

1 THE COURT: Overruled. I agree with you it's
2 conclusory, but I'll let him answer the question.

3 THE WITNESS: Yes. I mean again, it was our
4 intention -- and I'm going to step back. It's always
5 difficult as a bankruptcy lawyer to balance the writing of a
6 third-party release as broad as possible with making sure
7 you get the plan confirmed, and that was always the issues.

8 With respect to trying to bar claims from, for
9 example, President Trump against Gawker for articles written
10 by Gawker writers we were trying to block those claims.

11 The way we did so was one, to try to put into the
12 release, and two, if the release was not adequate to at
13 least make sure that there was an injunction such that -- I
14 think I even said this at the hearing -- that at least the
15 party would have to come back to this Court to determine
16 what the motive and what the relevance of pursuing such a
17 claim was even if the release was not broad enough.

18 THE COURT: Are you saying that the injunction is
19 broader than the release?

20 THE WITNESS: Your Honor, I think I said it at
21 that hearing, and to the -- I had always thought that the
22 release could be broader -- I mean that the injunction could
23 be broader, because to the extent you couldn't get a
24 release, because for example, I think I used this in my
25 deposition, if the person was not released because -- and

1 we'll get to the language I'm sure -- received or deemed to
2 receive, take Mr. Teal for example who didn't have as far as
3 I knew a claim -- and I said this in my deposition -- at
4 least if this person was released, the writers, from some
5 claims you may have to still come back and ask Your Honor
6 for permission to pursue it. So that was the intention that
7 I had with respect to this.

8 And if you look at the language, I think the
9 language of the third party -- the injunction is a little
10 bit broader than the language and the release.

11 THE COURT: Well it started out that way but the
12 plan that was confirmed had added to the extent of Section
13 9.05 three times the 9.02, which was not in the draft that
14 was being exchanged. Where did that come from?

15 THE WITNESS: Right. So I think that was
16 partially a result of conversations with Your Honor at the
17 -- as I recall -- at the hearing and then -- and trying to
18 make those come closer together as a result of that
19 language, as I recall.

20 THE COURT: So if the injunction is broader than
21 the release what is that language?

22 THE WITNESS: Again, I think if you -- always
23 anticipating that there'd be something that we didn't cover,
24 it was always at least my intention as the attorney for the
25 debtor, representing the debtors, to say I wanted the Court

1 to be the gatekeeper. If they were exactly the same, they
2 didn't cover anything, if there was a dispute as to whether
3 the release covered it, at least they'd have to come back to
4 the Court to have a proceeding such as this proceeding.

5 THE COURT: Go ahead.

6 BY MS. LEVINE:

7 Q In addition to the Trump claim had you received a
8 demand letter from the -- from R.J. Bell's attorney?

9 A Yes. My understanding is that I had not received it,
10 but it was in the files of Gawker and we were aware that
11 there was such a letter. There were a few other letters as
12 well.

13 Q And who was counsel to R.J. Bell in connection with
14 that letter?

15 MR. ESPER: Objection, relevance.

16 THE COURT: Overruled.

17 THE WITNESS: I believe it was the Harter (ph)
18 firm. We had received most of our letters, if not all of
19 them, from the Harter law firm.

20 BY MS. LEVINE:

21 Q And was the Harter law firm also representing other
22 creditors in the case?

23 A Yes. The Harter law firm again was not serving as
24 bankruptcy counsel, but the Harter law firm was Belaya's
25 counsel, Terrell's (ph)'s counsel, and Iudori's (ph)

1 counsel, all of whom were involved from the day one of the
2 case, and I believe they were also members of the creditors'
3 committee.

4 Q And they were -- were they involved in settlement
5 negotiations with regard to certain litigation that resulted
6 in allowed claims which were in fact paid 100 cents under
7 the plan?

8 A Yes, let's not -- I don't want to go quickly to the 100
9 cents.

10 So in late October we began negotiations or finished
11 negotiations as well with Mr. Belaya, at which Mr. Harter
12 was present. We focused on those settlement negotiations
13 because Mr. Belaya had all of his counsel there.

14 Then once we were a deal in principle with Mr. Belaya,
15 who Mr. Harter was one of the parties we were negotiating
16 with, along with Mr. Taback (ph), his bankruptcy counsel, we
17 then had separate meetings with Mr. Harter to negotiate the
18 terms of the Terrell and Iudori settlements.

19 All of those settlements against Gawker were finalized
20 I think in the beginning of November, at least in terms, and
21 then we did final documents. They all got finalized by
22 December 13th, the confirmation hearing, they all received
23 their payments before the effective date and before
24 December 31st of 2016.

25 Q In connection with those settlements were there

1 releases?

2 A There were releases of the Gawker entities. I mean I'd
3 like to see them again, because part of the issue is how
4 much was released and where it was released. But yes, there
5 were releases of the Gawker entities, there was also
6 cooperation agreements to get other types of releases. But
7 there were releases, and I believe they all voted in favor
8 of the plan.

9 Mr. Belaya didn't get paid 100 cent dollars, that's why
10 I wanted to qualify that, because he gets a contingent
11 reserve, and I won't speak to -- they accepted a payment for
12 their claims in certain amounts, whether that's payment in
13 full or not, they don't have any residual claim.

14 THE COURT: Who's they?

15 THE WITNESS: I'm sorry. Ms. Terrell and
16 Mr. -- Dr. Iudori both received payments, they reduced their
17 claims and received payments as well.

18 BY MS. LEVINE:

19 Q Were the writers who provided the content was the
20 subject of those litigations released in connection with
21 those settlements?

22 A No. So it all depended -- each one was a little bit
23 different.

24 With respect to Ms. Terrell there has never been a
25 release of the writers of those claims. There was ongoing

1 litigation in the New York State Court and I believe that
2 what ultimately happened is Gawker got release, Mr. Cook and
3 the other person whose name escapes me right now,
4 Ms. Terrell withdraw her complaint without prejudice as I
5 recall, and so there was no exchange of releases -- there
6 was negotiations but they never reached that.

7 With Dr. Iudori I believe that there were releases.

8 And with Mr. Belaya there were releases but it took a
9 lot longer because it had to get negotiated through
10 Mr. Delario's lawyers, Mr. Denton's lawyers, and I believe
11 that they ultimately exchanged releases, I'm just not
12 completely sure. But it did not happen until after
13 confirmation, at least with Mr. Delario, I believe.

14 Q Generally in the ordinary course of business did Gawker
15 indemnify its writers and content providers in connection
16 with defamation tech claims?

17 A Yes. I mean I had had -- and again I can't -- not
18 privileged -- but my understanding -- and we had defended,
19 as the Court knows -- we came in with Mr. Denton at one
20 point -- there was a policy to indemnify and advance the
21 defense costs of writers who were sued. Some writers had
22 actual contractual provisions to that. I mean Mr. Delario
23 didn't, we put that in front of the Court at one point. But
24 as a general matter it was policy, and I understand that
25 they had always done that and no one had paid their own

1 bill.

2 MR. ESPER: Move to strike, that's hearsay except
3 for the --

4 THE COURT: It is hearsay, you were a little slow
5 on that. But isn't this stipulated to in the pretrial
6 order? I thought I read that that was part of the
7 stipulation. Yeah, it's at paragraph -- it's paragraph D of
8 part 3. Gawker Media, LLC generally indemnified its content
9 providers for any claims, including claims of defamation and
10 related torts arising from the content provided to them for
11 the benefits of Gawker LLC.

12 So it's really stipulated to. But it is hearsay
13 and there's no foundation for his testimony. I won't strike
14 it only because it's a little late, but it's stipulated to.
15 Why don't you ask him what he knows about it?

16 BY MS. LEVINE:

17 Q Well Mr. Gilardi, was it your understanding that there
18 was an indemnification right that the writers and content
19 providers had against Gawker?

20 MR. ESPER: Objection, lack of foundation.

21 THE COURT: Sustained. Why don't you just put the
22 policies into evidence. I remember seeing bylaws in this
23 case, and you know, there's evidence of that.

24 MS. LEVINE: Actually, Your Honor I think I can
25 shortcut it and go a different way.

1 THE COURT: You stipulated --

2 MS. LEVINE: We've stipulated that there was an
3 indemnification and it's already in the record, and what
4 we're really getting at is --

5 BY MS. LEVINE:

6 Q Mr. Gilardi, as part of the settlement negotiations
7 with regards to the indemnification proofs of claim that
8 were filed by the writers, was it your intent to have the
9 writers withdraw those claims or have those claims resolved
10 as part of the confirmation process?

11 A Yes, it was.

12 Q And as part of giving up those rights did the debtor
13 offer something to the writers in connection with that
14 negotiation?

15 A Yeah. We offered to try to obtain as broad a third-
16 party release as we could obtain and to also obtain an
17 injunction as far as we could within what His Honor would
18 approve to seek to get them released and to seek to get them
19 an injunction so that they -- people would have to come back
20 to the Court.

21 Q And in exchange for the third-party release did the
22 writers provide consideration that included stipulating to
23 the withdrawal of their claims, stipulating not to object to
24 confirmation, and stipulating not to seek reserves with
25 regard to the claims reconciliation process?

1 A What I understood the quid pro quo was, they would vote
2 -- if they voted in favor of accepting the plan then those
3 things would have automatically occurred. So that we would
4 not have to establish reserves, they would not assert
5 indemnification claims, but they had to vote in favor of the
6 plan to obtain those. And I believe as I recall the record,
7 they all voted in favor of the plan. Your clients.

8 Q Now, turning to the language in the release, and in
9 particular there's two clauses that we're going to focus on
10 for a minute. The first one is going to be deemed to have
11 received, which is the discussion that we had at the prior
12 oral argument.

13 As lead bankruptcy counsel did you have a part in
14 drafting the language that was in 9.05?

15 A Yes, I did.

16 Q Did you formulate the deemed to have received language
17 that was in 9.05?

18 A If I didn't specifically formulate it it was myself and
19 an associate, Josh Sterum (ph), who did, but I was the one
20 ultimately responsible for saying this is the language we
21 will go with.

22 Q And did you -- and what is your understanding of that
23 language at the time you were drafting it?

24 MR. ESPER: Objection, that's subjective
25 understanding.

1 THE COURT: Well I'll overrule it. I'm interested
2 in whether this was discussed or negotiated.

3 THE WITNESS: The answer is as with any release --
4 third-party release -- so first the answer is, yes, I
5 thought about it and it was intended to be put in there.
6 What it was to cover was more a fact of circumstances that I
7 think you have to level set what we were trying to do. One
8 was --

9 BY MS. LEVINE:

10 Q I can -- let me -- I can narrow the questions --

11 A Sure.

12 Q -- to get more to where the judge is going.

13 Was it your understanding that the writers were
14 concerned about claims that had been asserted by creditors
15 who had not filed proofs of claim or might not be receiving
16 a distribution under the plan?

17 A Yes, that was my understanding.

18 Q And did you include any language in the release section
19 of 9.05 that was designed to address that issue?

20 A Yes. I believe the deemed to receive language was a
21 way to try to address that issue.

22 Q Okay. So now -- and now turning to the language in the
23 release with regard to the exclusion for intentional or
24 malicious conduct. Do you recall that language?

25 A I do recall that there is --

1 MR. ESPER: Objection, that misstates the plan.

2 THE COURT: Sustained. It's willful misconduct or
3 gross negligence is the issue -- phrase, which is the usual
4 phrase.

5 THE WITNESS: I have a book of exhibits in front
6 of me, may I look at the exhibits while --

7 MS. LEVINE: Yes.

8 THE COURT: Maybe you ought to show him some
9 exhibits.

10 BY MS. LEVINE:

11 Q Please turn to Section 9.05?

12 A Okay. I'm going to tab 1, which is Exhibit 1, and I
13 think the plan is attached as Exhibit A to that.

14 Q Okay.

15 A And I will -- as I recall it's 9.05.

16 THE COURT: Tab 1, I don't have that exhibit book.

17 THE WITNESS: I have a binder of documents --

18 THE COURT: Yeah, but that's --

19 THE WITNESS: -- movant Ryan's binder of exhibits,
20 which has Exhibit 1, and I have an A behind it.

21 THE COURT: I now have it. Thank you.

22 THE WITNESS: And I have Section 9.05 which
23 begins --

24 THE COURT: Can I stop you? I have Exhibits A, B,
25 C, et cetera, I don't have an Exhibit 1.

1 MR. ESPER: A, B, C is my binder, Your Honor.

2 THE COURT: That's yours.

3 MR. ESPER: You should have a second binder with
4 1, 2, 3.

5 THE COURT: This is a duplicate, I don't need
6 this. Okay. Sorry, I got it. Exhibit 1 is the
7 confirmation order and the plan, right?

8 THE WITNESS: Correct. And Exhibit A behind it,
9 Your Honor, is the plan itself.

10 THE COURT: Okay.

11 THE WITNESS: And I'm turned to page 81 of 94 if
12 you read the top docket file. That's where 9.05 starts and
13 82 is where it ends.

14 BY MS. LEVINE:

15 Q With regard to the exclusionary language did you have
16 conversations with the United States Trustee's Office with
17 regard to the third-party releases?

18 A Yes, I did.

19 Q And did you have conversations with the creditors'
20 committee with regard to the language in the third-party
21 releases?

22 A Well --

23 Q Let me go back to the U.S. Trustee. Did you have
24 conversations with regard to the scope of the releases with
25 the United States Trustee's Office?

1 A Yes, very brief conversations.

2 Q And what were the -- what was your understanding of
3 what the United States Trustee was concerned about with
4 regard to third-party releases?

5 MR. ESPER: Objection as phrased. His
6 understanding is irrelevant. She can ask --

7 THE COURT: What did you say to U.S. Trustee and
8 what did the U.S. Trustee say to you?

9 MR. ESPER: Exactly.

10 THE WITNESS: The U.S. Trustee -- I drafted the
11 plan and I put the language willful misconduct and gross
12 negligence in here. The U.S. Trustee, when I served out the
13 revised plan -- and I can't remember whether it was before
14 the disclosure statement hearing, and I think it was more
15 likely before the confirmation hearing -- asked me whether I
16 was looking for third-party releases, I said yes. Asked me
17 if I had put in standard language of willful misconduct and
18 gross negligence, and I said yes.

19 To anticipate, as I do when I draft plans, usually
20 the U.S. Trustees always ask if you're going to get a
21 release make sure you carve out willful misconduct and gross
22 negligence. I took the first step and did it, because I've
23 drafted a lot of these, and that's the language I always put
24 in. And so he really just affirmed that I put in the
25 language. There was no negotiation, there was no further

1 decision.

2 BY MS. LEVINE:

3 Q And did you have discussions with the writers with
4 regard to your understanding of your view of the scope of
5 that language and whether or not it would protect them
6 against defamation claims?

7 A Well I never had discussions directly with writers, and
8 frankly I didn't have discussions in the context of the plan
9 with respect to whether this language covered defamation
10 claims or not defamation claims.

11 In conversations that I had with Mr. Delario's lawyer I
12 actually learned for the first time that you could -- and
13 this was before -- after I drafted this, but before the
14 confirmation -- that writers and parties in this business
15 can get released for -- they are indemnified for defamation.

16 Quite honestly this language was from my head as a
17 bankruptcy lawyer and was not looking at the defamation
18 claims and the implications of those defamation claims.
19 It's more the Delaware standard of limits of what you could
20 do with indemnification and gross negligence and my 20
21 something years of bankruptcy practice and dealing with the
22 U.S. Trustee's Office.

23 Q Did you discuss the scope of the releases at the
24 confirmation hearing with the Court?

25 A Yes, we discussed the scope of the releases with the

1 Court. I know His Honor asked me questions about it, but
2 I'm not sure if the language with the gross negligence and
3 willful misconduct and the context of defamation ever came
4 up at that hearing. I don't recall.

5 Q I'm going to invite your attention to Exhibit 2.

6 A Okay.

7 THE COURT: Are you offering Exhibit 1 into
8 evidence?

9 MS. LEVINE: I was going to offer them all in at
10 the end, Your Honor, but --

11 THE COURT: Well if you're going to read from them
12 they should be in evidence.

13 MS. LEVINE: We offer --

14 THE COURT: Any objection to the receipt of
15 Exhibit 1?

16 MR. ESPER: No.

17 THE COURT: I think you stipulated.

18 MR. ESPER: No objection. There was a number of
19 stipulations in the --

20 THE COURT: Pretrial order. So 1 is received.

21 (Ryan Goldberg's Exhibit No. 1 was admitted)

22 THE COURT: And I think you stipulated to 2, which
23 is what we're about to turn to. So 2 is received.

24 (Ryan Goldberg's Exhibit No. 2 was admitted)

25 THE COURT: Go ahead.

1 MS. LEVINE: Thank you, Your Honor.

2 BY MS. LEVINE:

3 Q Mr. Gilardi, Exhibit 2 is a transcript of the
4 confirmation hearing.

5 A Okay.

6 THE COURT: Why don't you just point me to what
7 you want me to read.

8 MS. LEVINE: We are looking at page -- Your Honor,
9 we're looking at page 82, starting at line 16. And if you
10 carry over to page 83 up to line 8.

11 THE COURT: Okay. Go ahead.

12 BY MS. LEVIN:

13 Q Mr. Gilardi, do you -- take a minute, please, and
14 review the colloquy.

15 (Pause)

16 A And which page do you want me to read to line?

17 Q Page 82.

18 A I've read 82.

19 Q Page 83 to line 8.

20 A Okay. I've done so.

21 Q Do you recall that colloquy with the Court?

22 A Yes, I do.

23 Q Do you -- was it your -- is that still your view of the
24 third-party releases?

25 A Yes, Your Honor. I mean, yes, it is.

1 Q Thank you.

2 Mr. Gilardi, could you take a look at Bell's Exhibit G,
3 which is a November 2 communication -- email communication
4 from Ropes & Gray to Saul Ewing?

5 A Different binder, right? Okay. Okay.

6 Q Do you see that there's an email there that lists three
7 options with regard to the third-party releases?

8 A Yes.

9 THE COURT: Are you talking about 3?

10 MS. LEVINE: Yes.

11 THE WITNESS: It's Exhibit G in the other binder,
12 Your Honor.

13 MS. LEVINE: Sorry, Your Honor, Bell's Exhibit G
14 first, then we're going to go to Goldberg's Exhibit 3.

15 THE COURT: Okay. Go ahead.

16 BY MS. LEVINE:

17 Q Mr. Gilardi, did you draft the email?

18 A I did.

19 Q And do you recall sending it?

20 A I have no doubt that I sent it.

21 Q Did you provide three options with regard to the third-
22 party releases in the email?

23 A I gave three options with respect to the language
24 that's in the below emails, yes, and how to deal with the
25 concerns expressed, yes.

1 Q Does this communication change your understanding of
2 the scope of the releases as you previously testified?

3 A No, I think it captures what I was trying to do with
4 the language and what I thought could possibly get approved
5 and capture the language and help to explain to Dipesh, you
6 know, what were the bounds that I think we could go to and
7 what were the bounds of a potentially acceptable release to
8 the judge.

9 Q And did you discuss the language with Saul Ewing in
10 addition to having sent the email?

11 A I don't think I had any real conversations at this
12 point. We were doing this pretty much by email. I think
13 November 2nd was the day we were going to file the revised
14 disclosure statement. I know we got an email back to this
15 and I know there were a -- maybe one or two more emails, but
16 I wasn't really the author other than the clarification and
17 adding some language, I think that all happened within maybe
18 a two-hour period.

19 Q Turning to Goldberg's Exhibit 3.

20 A Exhibit 3. I have that in front of me.

21 Q Is this an email from you to the creditors' committee?

22 A It is. Well counsel to the creditors' committee,
23 Mr. Russell and Sandy Kuspa (ph).

24 Q Did you have any discussions with Mr. Russell after you
25 sent this email?

1 A I don't recall any discussions.

2 Q Do you still -- is it your -- do you believe that the
3 releases that are included in the plan are consistent with
4 your comments in this email?

5 A Yes. We drafted it and were going to seek a release
6 not only from people who received distributions but also
7 from those that did not.

8 Q And is that the deemed to have received language?

9 A That's my -- that was what we were trying to capture by
10 deemed to receive.

11 THE COURT: Can I ask you a question? The
12 language that's in 9.02 is the usual language, that
13 creditors are bound whether or not they file a claim.

14 THE WITNESS: Yes.

15 THE COURT: Why didn't you use that same language
16 for 9.05?

17 THE WITNESS: I think, Your Honor, I had to go --
18 and again --

19 THE COURT: It's just an unusual phraseology.

20 THE WITNESS: It's a very unusual phraseology,
21 Your Honor, and I think I said this in my deposition, I
22 don't think I've ever used the language -- that sort of
23 language again.

24 I think the issue came down to if I used the
25 language in that section and not obtained the third-party

1 release I would have had a resolicitation issue.

2 I don't remember why we went the way we did to be
3 honest, I just know I was trying to go to a certain point,
4 but again, leave open what I will call a person like
5 Mr. Peter Teal to fight about later, because at that point
6 we didn't think he was even a creditor. Whereas creditors
7 they can get distributions or not get distributions under
8 bankruptcy plans, but you know, if we went to seven, you
9 know, there's still a creditor. So it was just that sort of
10 thought.

11 I mean the language admittedly could have been
12 more direct, but that's why we used that language.

13 THE COURT: Are you saying that this received or
14 deemed to be received is a different -- is different from
15 the creditors whether or not they file a claim?

16 THE WITNESS: Well I think -- again, take
17 President Trump, he never filed a claim.

18 THE COURT: Right.

19 THE WITNESS: He did put us on notice of a claim.
20 So arguably he's a creditor.

21 THE COURT: Right.

22 THE WITNESS: And under Chapter 7, right, even if
23 he didn't file a claim, he filed late, he would be entitled
24 to a distribution.

25 Mr. -- so arguably what I was trying to cover is

1 people we knew of who were definitely creditors so they
2 would be deemed to receive whether or not, and we were
3 concerned about the litigation tactic of not filing a claim
4 and then going after successors and going after writers.

5 Take Mr. Teal, and I'm not saying the language --
6 well we don't have it before you -- but I said this in the
7 deposition -- Mr. Teal, the only thing we ever said about
8 Mr. Teal was in 2008. It's hard to think he was a creditor
9 or had a claim. If I were put on the stand about that one I
10 -- it wasn't that I was trying to capture Mr. Teal
11 necessarily and that whether the language captures it again
12 I come back to there's a qualitative difference in my mind
13 as to those types of people.

14 THE COURT: I just don't understand it, because --

15 THE WITNESS: I understand.

16 THE COURT: -- he's not a creditor, he can't be
17 deemed to have received a distribution, because only
18 creditors get distributions.

19 THE WITNESS: Only creditors get distributions,
20 but can a creditor be deemed to get a distribution if they
21 didn't file a proof of claim? That's really the question.
22 Was I trying to capture something broader than people who
23 prosecuted their claim --

24 THE COURT: But that's what the language in 9.02
25 does that. I just don't understand the selection of this

1 language. And you seem to think there's a difference and I
2 -- if there's a difference I'd like to know it.

3 THE WITNESS: To me that somebody could be deemed
4 to receive a distribution even if they didn't prosecute
5 their proof of claim. That was the intention to get as
6 broad as we could.

7 THE COURT: Go ahead.

8 MS. LEVINE: No further questions at this time,
9 Your Honor.

10 CROSS-EXAMINATION

11 BY MR. ESPER:

12 Q Good morning, Mr. Gilardi.

13 A Hello. Good morning.

14 Q Let me ask you about that last exchange --

15 A Sure.

16 Q -- that you just had be Judge Bernstein. A bankruptcy
17 plan is a public document isn't it?

18 A Yes.

19 Q Any member of the public can go on Pacer and they might
20 have to pay a fee but they can look this up and read it,
21 right?

22 A Correct.

23 Q And is it fair to say based on your experience as a
24 bankruptcy lawyer that one of the purposes of the various
25 documents filed in the bankruptcy proceeding is to give

1 everybody in the world notice as to whether or not they can
2 go ahead and file claims against the debtor, correct?

3 A Correct.

4 Q So if a prospective creditor read paragraph 9.05 of the
5 plan is it your belief sitting here today that the creditor
6 would conclude that even if they did not file a proof of
7 claim in the bankruptcy court that they were covered by your
8 language in 9.05?

9 A Well when you say file a claim let's make sure we're
10 talking about the same thing. Filing a claim against Gawker
11 they were already barred, there was bar dates. Okay. If
12 you're saying prosecuting a claim against a writer, is that
13 what you're asking me about?

14 Q Yes. I'm asking about a circumstance that you just
15 testified in 9.05 --

16 A Sure.

17 Q -- a claim against a third-party writer and the -- this
18 person -- this potential claimant has to determine whether
19 they can file that claim, correct?

20 A Whether they can prosecute a claim against a writer for
21 an article written by a Gawker writer when they were a
22 Gawker writer they would go to that language, they would
23 also go to the transcript, which is also public, and they
24 would make the decision am I covered or not by the deem to
25 receive language?

1 Q And is it your belief based on your expertise of the
2 bankruptcy law that a lawyer for such a potential claimant
3 will be able to read the deemed to receive distribution
4 language and make a conclusion definitively one way or
5 another as to whether their claim against the third party is
6 barred?

7 MS. LEVINE: Your Honor, whether Mr. Gilardi is an
8 expert, we didn't offer him as an expert witness, just as a
9 fact witness.

10 THE COURT: Are you objecting to the question?

11 MS. LEVINE: So we would object --

12 THE COURT: Sustained.

13 BY MR. ESPER:

14 Q Mr. Gilardi, is it not true that you have over two
15 decades of experience in the bankruptcy courts?

16 THE COURT: The problem with the question is
17 you're asking him what a reasonably prudent lawyer for a
18 creditor -- how that person would interpret the language,
19 and that's really an improper question.

20 MR. ESPER: Okay.

21 THE COURT: It says what it says. I can figure
22 out what it says.

23 MR. ESPER: Okay.

24 BY MR. ESPER:

25 Q Did you -- when drafting 9.05 did you give any

1 consideration to whether potential claimants reading this
2 language would be able to understand what deemed to have
3 received distribution means?

4 A I don't recall thinking about that particular issue.

5 Q At --

6 THE COURT: Was this discussed in the disclosure
7 statement?

8 THE WITNESS: The third-party releases were, Your
9 Honor, and that is one of the reasons that I was very clear
10 on the record at the confirmation hearing with respect to
11 Trump and to give exactly the example that I gave to Your
12 Honor, because Your Honor specifically asked me, are there
13 people who may have had claims that didn't file claims and
14 didn't vote? The answer was, absolutely, yes, this language
15 was intended to cover them.

16 That's exactly why, to the extent there was
17 ambiguity and to the extent I've litigated enough third-
18 party releases, I wanted to be very clear with Your Honor
19 with this specific concrete example that said, that was the
20 kind of claim I was trying to bar.

21 THE COURT: Okay.

22 BY MR. ESPER:

23 Q Mr. Gilardi, do you consider yourself to have been the
24 most knowledgeable person with respect to the history of the
25 Gawker bankruptcy case?

1 A Yes.

2 Q Before this case I assume you had drafted plans in
3 previous bankruptcy cases?

4 A Yes.

5 Q About how many?

6 A Over 30.

7 Q Before the date of the confirmation hearing did you
8 have any oral discussions with Ms. Levine about the meaning
9 of the term deemed to have received distributions?

10 A I think other than the exchange on the November 2nd
11 date I don't recall specific conversations.

12 Q And to be clear, the exchange on the November 2nd date
13 that you're referring to is an email exchange, correct?

14 A The email exchanges, yes.

15 Q So there was no separate oral discussion of that matter
16 with Ms. Levine?

17 A Not that I recall.

18 Q Okay. And before the date of the confirmation hearing
19 did you have any oral discussions with Dispesht Patel about
20 the meaning of the term deemed to have received
21 distributions?

22 A Not that I recall.

23 Q And did you have any oral discussions with any other
24 member of the Saul Ewing about the meaning of the term
25 deemed to have received the distribution?

1 A Not that I recall.

2 Q Let's take a look at another exhibit.

3 MR. ESPER: First of all I guess a housekeeping
4 matter, Your Honor, so --

5 THE COURT: Uh-huh.

6 MR. ESPER: -- that we don't have to move them in
7 one at a time. I would move into evidence all of our
8 exhibits, all of which have been stipulated to by the other
9 side in the pretrial order.

10 THE COURT: All right. Any objection?

11 MS. LEVINE: No, objection, Your Honor.

12 THE COURT: All right. And what are the -- what's
13 the range of exhibits?

14 MR. ESPER: The range of exhibits --

15 THE COURT: A to what?

16 MR. ESPER: A to M.

17 THE COURT: Okay. They're received.

18 (Moving Party's Exhibit Nos. A through M were admitted)

19 MR. ESPER: And then I would also, even though
20 it's unusual, I don't think the other side did it and I
21 think it's relevant and should be in evidence, I move into
22 evidence their Exhibit No. 1.

23 THE COURT: It's already received.

24 MR. ESPER: Okay.

25 BY MR. ESPER:

1 Q Mr. Gilardi, take a look at Exhibit G. Now, you
2 discussed in your direct testimony the email on the top of
3 this email thread, but I want to direct you down to the
4 email below it.

5 A Uh-huh.

6 Q Which is the email that you were responding to from
7 Dipesh. Do you see that?

8 A I do.

9 Q Okay. And with respect to that email after quoting
10 9.05 or a draft of 9.05 Mr. Patel says, "What does deemed to
11 have received distributions mean?" So you understood that
12 in writing your 1:06 p.m. email at the top that you were
13 responding to Mr. Patel's question, correct?

14 A Correct.

15 Q Okay. And your first -- the part of your answer reads,
16 "I cannot say that the third parties received a distribution
17 if not proof of claim."

18 A Uh-huh.

19 Q So in saying this you were intending to communicate to
20 Mr. Patel that you did not believe that third parties who
21 did not file a proof of claim had actually received a
22 distribution, correct?

23 A Correct. If you didn't file a proof of claim you would
24 not actually receive a distribution.

25 Q Now, as to the second part of this email you say --

1 well I'll go up to the top, you say, "You tell me how you
2 want to address." Did Mr. Patel tell you how he wanted to
3 address the issue?

4 A There is subsequent email as to whether he accepts the
5 language, wanted to change the language, or something else,
6 but I don't have that email in front of me, I can't remember
7 how it all played out.

8 Q Okay. Take a look at Exhibit H.

9 A Okay.

10 Q Do you recall receiving Exhibit H?

11 A Yes, I do.

12 Q Okay. And is Exhibit H Mr. Patel's response to your
13 question?

14 A Yes, it looks like it.

15 Q Okay. And now go to Exhibit I.

16 A Okay.

17 Q And Exhibit I is your response to Mr. Patel?

18 A Correct.

19 Q Okay. Now, would you turn to Exhibit J?

20 A Uh-huh.

21 Q First question is who is Mr. Sterum?

22 A Mr. Sterum is it an associate at Ropes & Gray or now
23 counsel at Ropes & Gray.

24 Q Okay. And what was his relationship to this case?

25 A He was other than the other partner on the case he was

1 the senior most associate and primary drafter of the plan
2 that I reviewed.

3 Q Okay. So is it fair to say that I believe your earlier
4 testimony was that you were ultimately responsible for the
5 language in 9.02 and 9.05, is it fair to say you worked with
6 Mr. Sterum in the crafting of that language?

7 A Yes.

8 Q Okay. Now, Mr. Sterum in the second sentence of this
9 email says, "We'd also prefer not to make a change to 9.05
10 to draw further attention to the issue, reduce the
11 likelihood of getting that section approved." Do you see
12 that sentence?

13 A Yes.

14 Q Agree with Mr. Sterum?

15 A We -- yeah. Again, we covered this in my deposition.
16 The point was the fewer changes you make to language at the
17 last minute before a disclosure statement that you need to
18 go out on the more likely it is that you get the disclosure
19 statement approved.

20 Q Was there any specific concern that you had about
21 drawing further attention to the issue in Section 9.05?

22 A It's third-party releases, it always has the most
23 attention from the U.S. Trustee's Office and from everybody.
24 So the less you change things, if people had not commented
25 before you have less issues to address as you move to a

1 hearing.

2 Q And why do third-party releases garner so much
3 attention?

4 A Because generally speaking under the Bankruptcy Code
5 the only entity that should be released is the debtor
6 entity.

7 Q Is it fair to say at a you fully informed Mr. Patel
8 that there was a risk that if the release language was
9 broader than what was ultimately included in 9.05 it would
10 not be approved by the Court?

11 A I affirm -- yes, I said that there's a risk with any
12 third-party release, and if it were broader I think -- let's
13 go back to G -- G, Exhibit A, the first option is to me what
14 I was saying is make it broader, try to bind everyone, then
15 there's no consideration and the judge will likely not
16 approve, if he doesn't I don't want the argument, that the
17 votes were based on consideration they did not receive and
18 have to resolicit. So that was a concern.

19 Q And ultimately you took all of these concerns into
20 account in your written discussions with Mr. Patel and made
21 the choice to go with the language deemed to have received a
22 distribution, correct?

23 A Correct.

24 Q Did you give any consideration to including language
25 that said something along the lines of to the fullest extent

1 permitted by applicable law all third parties shall be
2 deemed to be released unconditionally, each and every one of
3 the employees? Did you give any consideration using that
4 sort of language?

5 A I don't remember that specific language. I know the
6 judge when we came to the confirmation hearing said to use
7 to the extent of the applicable law, but with respect to the
8 specific language you mention with respect to employees then
9 it would have been employees and independent contractors I
10 don't recall having a discussion or thinking about using
11 that broad of language.

12 And again, the other issue about that is to the extent
13 of applicable law the real issue here also went to the
14 solicitation issue and what their votes, the employees and
15 the independent contractors, were going to be basing their
16 vote to accept or reject on. I didn't want a resolicitation
17 issue, because if I said you -- thou shalt get them and you
18 don't get them I had to resolicit, and we've talked about
19 the tax issue.

20 Q Isn't it true that the language that you ultimately put
21 in Section 9.05 regarding "deemed to have received
22 distributions," was in your professional judgment the best
23 you could do to respond to the concerns of the Saul Ewing
24 firm regarding the releases of the riders while still
25 getting the release of language approved by the Court?

1 MS. LEVINE: Your Honor, I would object. To the
2 extent he's again asking for an expert answer. I'm not sure
3 if professional judgment teeters on that.

4 THE COURT: He's asking him why he included a
5 particular provision or why he didn't include a different
6 provision (indiscernible).

7 THE WITNESS: I think it's fair to say that, and
8 this e-mail says it, I pushed it as far as I thought I could
9 do with getting the plan confirmed.

10 BY MR. ESPER:

11 Q Now, let's talk about the creditors committee. There
12 was a privilege claim which I respect, and I don't want to
13 get into. So I'm going to ask you, did you have any non-
14 privileged discussions with the creditor's committee
15 regarding the meaning of the term "deemed to have received
16 distributions?"

17 THE COURT: He didn't represent the creditors
18 committee. That wouldn't be privileged.

19 MR. ESPER: Well, Your Honor -- I mean, the -- at
20 the deposition, Mr. -- I will represent to the Court Mr.
21 Gilardi and his counsel interposed a privilege claim on the
22 basis of a joint interest. And I don't want to
23 mischaracterize their argument, just to say that --

24 THE WITNESS: So with respect to the committee,
25 there were no non-privileged conversations regarding the

1 language "deemed to receive." The only -- frankly, the only
2 communications are what you have, which were non-privileged
3 communications.

4 BY MR. ESPER:

5 Q And just to make clear to the Court, with respect to
6 the privilege claims that your firm has interposed with
7 respect to communications with the creditors committee, you
8 are still interposing that privilege claim, correct?

9 A Again, I don't -- since I was more of the witness as
10 opposed to the attorney, I don't remember whether we
11 actually stood on that or we decided to let the
12 communications go. I kind of remember we said, and the
13 committee said, you can have the communications and we gave
14 you the communications subsequent which is how you got the
15 e-mail that was my e-mail to Mr. Russell.

16 Q Okay. Well, I'll ask you more broadly then. Did you
17 have any discussions at all with the creditors committee
18 with respect to the meaning of the term "deemed to have
19 receive the distribution?"

20 A Other than the e-mail, I don't believe there were any
21 other communications.

22 Q Okay. Now, "deemed to have receive a distribution," is
23 it fair to say that that language assumes that either
24 someone or something is doing the deeming?

25 A It is fair to say that.

1 Q Okay. So in this instance, what is your understanding
2 as to who or what was deeming to receive a distribution?

3 A Okay. Sort of the mechanics here would be the
4 following. You would be deemed under the plan to have
5 received a distribution. So it was the plan, but the plan
6 had to be approved. So if the plan got approved, it would
7 be the confirmation order and ultimately we -- it would be
8 the Court that would have approved that language.

9 Q But the plan is deeming someone to have received a
10 distribution, correct?

11 A Correct. Essentially, you're drafting a contract that
12 says you're either a third party beneficiary or the third
13 party giver of a release.

14 Q And Exhibit 1 is the plan?

15 A Correct.

16 Q Or Exhibit 1 is the order that attaches the plan?

17 A Correct.

18 Q Would you point out to me and the Court the provision
19 of the plan that you believe deems my client to have
20 received a distribution?

21 A I'm not going to say it's a trick question. There is
22 no specific thing that says your client, right? What 9025 -
23 - let me go -- what 9025 talks about, as I recall, let me go
24 to the language.

25 THE COURT: I think he's asking a different

1 question.

2 THE WITNESS: Okay.

3 THE COURT: And that is there's a plan with a
4 disclosure statement. I guess say anywhere that you deemed
5 to receive a distribution, whether or not you filed it. Is
6 that your question?

7 MR. ESPER: That is essentially my question, Your
8 Honor.

9 THE WITNESS: I don't think there is specific
10 language to that effect. I think it says that all interest
11 holders and all -- and that's why I want to go to the
12 language that's specific.

13 BY MR. ESPER:

14 Q Well, take your time. Go to the language that you
15 think best answers my question.

16 A Okay. So it's not the specific thing you're looking
17 for, but 9.05 says in the fourth line, "Each holder of a
18 claim," it doesn't say allowed, "or equity interest," it
19 doesn't say allowed, "that is received or is deemed to have
20 received distributions under the plan shall be deemed to
21 have forever released." That's language that says not just
22 holders of allowed claims, or allowed interest, it's any
23 holder of a claim or an equity interest.

24 Q So is it fair to say that there's no -- nothing in this
25 plan that you're aware of, other than the very sentence that

1 uses the term "deemed to have received a distribution," that
2 defines the universe of people who are deemed to have
3 received a distribution in 9.05?

4 A Well -- okay, I'll go back to some other definitions
5 again. I've got to go back to the definition of claim
6 holder, but I think if you're a holder of a claim, it
7 doesn't mean you -- claim. If you look at definition of a
8 claim, it means a claim against the debtor of the Bankruptcy
9 Code which has not been disallowed under an order for which
10 an order of disallowance has been reversed on appeal.

11 So I believe if you went through the definitions, you
12 could say was I -- if I were a holder of a claim, and a
13 claim is broadly defined, I would say okay. Again, I'm the
14 lawyer, so I know. But each holder of a claim, claim is
15 broadly defined in the Bankruptcy Code, each holder of an
16 equity interest, I could say that that would apply to me if
17 I held the claim. It didn't say allowed. It does say I'm
18 deemed or deemed to have received.

19 Again, I think you could say I'm on notice that I may
20 be deemed to have receive something, I could get a release.
21 I'm not saying there's other language that couldn't have
22 been more precise. I'm saying that that's the language
23 that's here and somebody could have been on notice, take the
24 description of the president elect's claim at the
25 confirmation here. I think there was a public knowledge

1 that this could apply to you.

2 Q But the language of the definition of claim in the plan
3 doesn't say who is deemed to have received a distribution,
4 does it?

5 A No, it does not say that.

6 THE COURT: Could you shut off the phone?

7 MR. ESPER: I apologize. I thought I shut it off.
8 I really apologize to the Court. I literally shut the thing
9 off, I don't know --

10 THE COURT: But it rang anyway, or it's deemed to
11 have rang.

12 MR. ESPER: I knew that was coming at some point.
13 So stipulated, Your Honor. Okay.

14 BY MR. ESPER:

15 Q Now, can we take a look at 3 -- Section 3.05 of the
16 plan for a moment?

17 A Yes.

18 Q Section 3.05 entitled "Payments to plan reserve
19 account" reads, "Subject to section 3 point" --

20 A Could you hold -- slow down one second. I just have to
21 --

22 Q Sure.

23 A -- find it. I found it. I found it.

24 THE COURT: Page 30 of the plan.

25 BY MR. ESPER:

1 Q Page 30 of the plan, page 67 of the --

2 A Yeah, 67 on the top page. Yeah, thank you.

3 Q Okay. So I will read the section, which is short.

4 "3.05, payments to plan reserve accounts. Subject to
5 Section 3.04, any payment to a plan reserve account shall be
6 deemed a distribution to the applicable beneficiaries of
7 such plan reserve account as of the date of funding of the
8 plan reserve account." Do you see that language?

9 A I do.

10 Q So first of all, let's go with a little bit of
11 background as to this. The plan calls for the creation of
12 one or more reserve accounts to reserve money to pay claims
13 against the estate, right?

14 A Correct.

15 Q And if a proof of claim was filed and money was
16 reserved, but for one reason or another, that claim is
17 disallowed, that person would nonetheless have been deemed
18 to receive the distribution under Section 3.05, correct?

19 A I don't think this refers to the person. It's the
20 beneficiaries. Whether that person ultimately is a
21 beneficiary of that is a different issue, right? Because if
22 they don't have a claim, they're no longer going to be a
23 beneficiary.

24 Q Okay. So then -- so who is deemed to -- I want to use
25 the language. What is deemed to be a distribution under

1 3.05 to your understanding?

2 A So as part of a confirmation of this plan, there were a
3 series of reserves established. One was for unsecured
4 claims. One was for some tax claims. The whole point of
5 this was when -- whether we went on the effective date, and
6 in some instances before the effective date, we funded
7 reserves.

8 I'll give you the specific example and I'll talk about
9 the beneficiary. There is a claim that is still pending in
10 this bankruptcy case, the claim of Mr. Johnson. I can't
11 remember his first name. We had to establish a reserve
12 pursuant to an order of the Court on the -- when we went to
13 confirmation, a reserve of \$1.5 million for his potential
14 claim. So that money got funded into a reserve on -- before
15 December 31st.

16 Mr. Johnson's claim has not ultimately been determined,
17 but if it is, then it will be deemed to have been a payment
18 to the plan reserve and therefore to Mr. Johnson, if it's
19 allowed, as of July -- as of December 2016. So then when he
20 comes to pay taxes on those things, we'll have a date
21 certain by which he would have gotten it.

22 If, however, we prevail in our objection, he's never
23 receive that money. It really is for the accounting of the
24 tax.

25 THE COURT: I think the question is a different

1 question, though. We use here -- you're deemed to receive a
2 distribution if the payment is made on your behalf to the
3 plan reserve account because it is a dispute or something
4 like that.

5 THE WITNESS: Correct.

6 THE COURT: And under 9.05, you're deemed to
7 receive that distribution and that claim is released, even
8 if it's ultimately disallowed because you're deemed to
9 receive the distribution on the date that the reserve
10 account is funded for that claim, right?

11 What he's asking is if the claim is never funded to
12 the reserve account and that's the only deemed to be
13 distribution under the plan, then how can a creditor who
14 never files a claim be deemed to have received a
15 distribution? Or how can a creditor whose claim was never
16 funded or paid --

17 THE WITNESS: I understand your point and I don't
18 think the provisions were intended to work in tandem as
19 you're suggesting they do. I think this was simply to say
20 for tax purposes, we're putting the money here. For the
21 purposes of deemed to have received, Your Honor, because --
22 for example, take again Mr. Johnson who filed a claim, Mr.
23 Trump -- President Trump who didn't file a claim. Mr. Trump
24 would never have had a reserve for his account. We still
25 believe, as I gave you the example, Mr. Trump would have

1 released his claim.

2 So Mr. Johnson is different than Mr. Trump in the
3 sense that he filed the proof of claim. I don't think
4 there's a dispute as to whether or not -- now, if his claim
5 is disallowed and he wants to go sue the writers, that's not
6 -- we think that claim has been released. He's participated
7 in the bankruptcy. And even though he did not actually
8 receive, he's not deemed -- maybe he's deemed to receive --

9 THE COURT: But he's deemed to receive the
10 distribution on his claim as funded in the reserve account.

11 THE WITNESS: Well, this is a deemed -- a
12 distribution to the beneficiaries. Again, we were thinking
13 of this as for tax purposes. I understand again for the
14 actual date that they would have start (indiscernible)
15 liability for taxes, just like you do when you do
16 liquidating trusts, you put them in the beneficiaries. And
17 those people start paying taxes on the day of a liquidating
18 trust for tax purposes. This was drafted along those same
19 lines. Not so much for, this is going to determine whether
20 you give a release or not.

21 THE COURT: Go ahead.

22 BY MR. ESPER:

23 Q Is it your custom when drafting a provision such as
24 9.05 and its language about "deemed to have receive a
25 distribution," to check whether similar language is used in

1 other portions of the document?

2 A I will say in this case, I don't know if I have a
3 practice because I have a lot of people drafting the plan.
4 So I assume they look around to see if it's -- if the
5 phrases are used. If they didn't, I'm not surprised that
6 the word deemed showed up here as well. But I think that's
7 -- generally, it's good practice to see if the phrases are
8 used just like when you write statutes in your Congress.
9 It's a good practice. Does it always work? No.

10 Q And ultimately, as you testified earlier, you're
11 responsible for the language in 9.05, correct?

12 A Absolutely.

13 Q Let's move on to the subject of gross negligence or
14 willful misconduct. Did you have any specific discussions
15 with anyone at the Saul Ewing law firm regarding the meaning
16 of the term gross negligence?

17 A Not that I recall.

18 Q And did you have any specific discussions with anyone
19 at the Saul Ewing law firm regarding the meaning of the term
20 willful misconduct?

21 A Not that I recall.

22 Q Do you have any specific discussions with the U.S.
23 Trustee regarding the meaning of the term gross negligence?

24 A I would say it this way. I didn't have express
25 conversations with the Office of the U.S. Trustee as to what

1 it means in the context of this particular case. What I did
2 have was discussions that I've already mentioned, very
3 short, did you put in your usual carve outs of gross
4 negligence, willful misconduct, which I interpreted to be
5 Delaware law-type provisions or what's usually carved out in
6 corporate charters.

7 Q But you didn't have any discussions with the trustee
8 following on that about what the term gross negligence might
9 actually mean in the plan, correct?

10 A Correct.

11 Q And would your answer be the same with respect to
12 willful misconduct?

13 A Correct. It would be the same.

14 Q And did you have any discussions with the creditors
15 committee regarding the meaning of the term gross
16 negligence?

17 A Not that I recall.

18 Q And did you have any discussions with the creditors
19 committee regarding the meaning of the term willful
20 misconduct?

21 A Not that I recall.

22 Q In your experience as a bankruptcy lawyer, you have
23 never received a third party release in a Court approved
24 bankruptcy plan that does not contain a carve-out for gross
25 negligence and willful misconduct, correct?

1 A I don't recall having seen any.

2 MR. ESPER: Nothing further, Your Honor.

3 THE COURT: Redirect?

4 MS. LEVINE: Briefly, Your Honor. Your Honor, for
5 housekeeping, I just want to make sure the Goldberg Exhibit
6 3 is moved into --

7 THE COURT: I don't remember. Was there any
8 objection to that one? I don't think there was.

9 UNIDENTIFIED SPEAKER: No, Your Honor, the parties
10 --

11 MR. ESPER: I don't think there's an objection to
12 3, I think, it's fine.

13 THE COURT: Okay.

14 MR. ESPER: Yeah, no objection.

15 THE COURT: All right. 3 is received.

16 (Goldberg Exhibit No. 3 admitted into evidence)

17 MS. LEVINE: Thank you, Your Honor. It's one of
18 the stipulated exhibits already.

19 REDIRECT EXAMINATION

20 BY MS. LEVINE:

21 Q Mr. Gilardi, I'm going to draw your attention back to -
22 - I draw your exhibit back to Mr. Bell's Exhibit G, which is
23 your e-mail regarding the third party releases to Saul
24 Ewing. Do you have that in front of you?

25 A I do.

1 Q All right. Do you see the time that e-mail was sent?

2 A Yes.

3 Q Do you see that it says 10:06:40?

4 A Yes.

5 Q I draw your attention now to Goldberg 3.

6 A Goldberg 3. I see it.

7 Q Do you see the time that this e-mail was sent?

8 A Yes, I do.

9 Q And was it before or after the e-mail to Saul Ewing?

10 A The e-mail to Saul Ewing was 10:06:40 p.m. and this was
11 10:14:09 p.m., so it was after.

12 Q So at the time -- so as part of these negotiations, was
13 it your understanding that the release language in the plan
14 was intended to cover people who did not actually receive
15 distributions under the plan?

16 A That's what I told the committee and that's what my
17 understanding was.

18 Q You had some discussion with regard to the deemed to
19 have received language on cross-examination. Do you recall
20 that colloquy?

21 A Yes.

22 Q Okay. Is it your understanding that you included the
23 phrase "deemed to have receive," in addition to actually
24 having received in the release because you expected it would
25 expand upon those creditors that were barred and bound by

1 the release?

2 A Yes, I mean it was -- again, one says received. One
3 says deemed to have received. So -- and it was an or, so I
4 know enough that I was trying to go beyond merely having
5 received a distribution.

6 Q Were there substantial revisions to the plan and the
7 disclosure statement up until the point in time you actually
8 filed it?

9 A It depends on which one you're talking about. At this
10 time, what precipitated these particular changes at the end
11 of October was what I referred to earlier as negotiations
12 with Mr. Belaya. The plan got entirely renegotiated with
13 distributions and Gawker Media and all that during the last
14 week of October to the first week of November to try to put
15 all of this together on an expedited timeframe to make sure
16 I could get effective by that end of December.

17 So yes, there was substantial changes and instead of
18 having litigation regarding any wide number of issues,
19 including with Mr. Belaya and the allocation of sale
20 proceeds, this plan was the consensual plan that was trying
21 to bring all of those pieces together. So there was
22 substantial changes at the time of this between the prior
23 plan and this plan.

24 After this, there were not so many changes.

25 Q Well, there was some colloquy with regard to a

1 potential inconsistency with the use of the "deemed to have
2 receive" language in Chapter 3 of the plan and the "deemed
3 to have receive" language in the release section of the
4 plan. Was -- were all of these -- was this drafting taking
5 place simultaneously on the eve of the filing of the plan?

6 A Again, I will say I focused a lot on Section 902, 905.
7 I did not focus a lot on Section 3.05 and what was going on
8 in 3.05 at that time. If somebody showed me the draft, I
9 can say we were looking at it or not. I don't remember that
10 it was in there. I think it was not in there and put in in
11 this section, but I don't have a definitive recollection and
12 I believe we put it in there because we were establishing
13 the plan reserves and it refers to the plan reserves. And
14 we wanted to make sure that we could make the distributions
15 and get the tax consequences.

16 So whether it matched up to 9.05, I just don't remember
17 us ever even thinking about it, to be honest. I remember we
18 had two jobs. Make sure we could make the distributions,
19 get the tax benefits, and look at the releases and make sure
20 we get as best we could under the circumstances.

21 Q The attorney at the U.S. Trustee you were dealing with,
22 was that Mr. Zipes?

23 A Yes.

24 Q Do you recall conversations with Mr. Zipes about
25 whether or not you were intending to protect the writers in

1 connection with the third party releases?

2 A Yes, I do.

3 Q And what were those conversations?

4 A Well, Mr. Zipes and I had discussed it any number of
5 times. But going into confirmation, I asked whether he had
6 concerns as the U.S. Trustee's office often has with third
7 party releases, and he thought this was a very good case for
8 third party releases. So he was supportive of them, again.
9 Then he asked that question, did you put in your standard?
10 And I said yes, I'd make your job easy. I'd put in the
11 gross negligence/willful misconduct standard carve-outs that
12 I do in all my plans. And he said, then I think we'll have
13 no problems.

14 He reported back that he had no problems. And at
15 confirmation, he had no problems with the third party
16 releases.

17 Q But you did express to him that you were looking to
18 protect the writers --

19 A Yes.

20 Q -- during those conversations. And what were you
21 looking to protect the writers from?

22 A Again, the -- throughout this case we've been trying --
23 we had tried to protect the writers because, again, I was --
24 first, they didn't have a lot of assets. They had always
25 relied on Gawker to fund litigation. Two, there was a

1 process by which people approved the articles. And I had
2 numerous conversations with people approving the articles.

3 So if the process went through and the articles were
4 approved, the idea was to protect the writers from having
5 third parties sue them when they had no assets and where
6 Gawker had put its imprimatur by going ahead and allowing
7 the articles to go out, for better or worse. Belaya turned
8 out to be for the worst, but the other articles, they had a
9 very good track record.

10 So the intention was to try to protect them and at the
11 same time, not everybody -- not have the writers come back
12 on indemnification claims against the company and not have
13 to pursue 502(c), 502(e) litigation with respect to every
14 writer on getting their claims to be estimated at zero,
15 because it would have slowed down the distributions. And we
16 were completely conscious of a fact that there was a
17 billionaire out there who had now disclosed publicly that he
18 had financed litigation. So this was a major concern for us
19 throughout the case.

20 Q When you discussed the Trump litigation with the Court,
21 was it your intent to explain that the release covered
22 claims like those that were alleged by Mr. Trump?

23 A Yes.

24 Q And did you -- do you believe that this is the same
25 sort of claim and that it's covered by the release?

1 MR. ESPER: Objection. That --

2 THE COURT: Sustained.

3 MR. ESPER: -- calls for a legal --

4 THE COURT: Sustained.

5 BY MS. LEVINE:

6 Q Is it your understanding that similarly this type of
7 claim should be barred by the release?

8 MR. ESPER: Same objection.

9 THE COURT: Same result. It's sustained.

10 MS. LEVINE: No further questions, Your Honor.

11 MR. ESPER: Nothing further, Your Honor.

12 THE COURT: I had a question. Would you turn to
13 Exhibit G, which we've been discussing?

14 THE WITNESS: Exhibit G, yes, Your Honor.

15 THE COURT: And Mr. Patel's 3:57 p.m. e-mail says,
16 "What is deemed to have received a distribution mean?" And
17 then asks, "If a third party hasn't filed a claim or a
18 lawsuit, is that party deemed to have received a
19 distribution for the purposes of 9.05?" Right? Did you --
20 and your response to that e-mail is the next e-mail above
21 it. And you say, "I cannot say that third parties received
22 a distribution if not a proof of claim."

23 THE WITNESS: Correct.

24 THE COURT: And this is a response to his question
25 about what deemed to have received a distribution was?

1 THE WITNESS: Correct.

2 THE COURT: Okay. You can step down. Let's take a
3 five minute recess.

4 (Recessed at 11:32 a.m.; reconvened at 11:42 a.m.)

5 THE COURT: Be seated. Call your next witness.

6 MS. BIERUT: Your Honor, before we start with the
7 next witness, we just have a quick clarification about --

8 THE COURT: Sure.

9 MS. BIERUT: -- the common interest agreement we
10 had with the creditors committee.

11 THE COURT: Yeah.

12 MS. BIERUT: We had an agreement beginning from the
13 date of the Belaya settlement in October of 2016. There's
14 got to be a common interest between the debtors and the
15 creditors committee. After our initial production, R.J.
16 Balas' firm asked for an additional production. But any
17 communications about the plan between the committee and the
18 debtors from September 16th through, I believe, November
19 2nd, 2016. And we agreed to make that initial production on
20 the condition that privilege would not be waived.

21 So that's (indiscernible).

22 THE COURT: I hear you. Okay.

23 MS. LEVINE: Your Honor, we call William Holden.

24 THE COURT: Okay. Please step up, Mr. Holden, and
25 raise your right hand.

1 WILLIAM HOLDEN, WITNESS, SWORN

2 THE COURT: Okay. Please take a seat and speak
3 into the microphone.

4 DIRECT EXAMINATION

5 BY MS. LEVINE:

6 Q Good morning, Mr. Holden. Please state your full name
7 for the record.

8 A William D. Holden.

9 Q And what is your occupation?

10 A I am a turn around and restructuring consultant.

11 Q What's your current role in the Gawker bankruptcy
12 proceeding?

13 A Right now I am the plan administrator.

14 Q And prior to confirmation, did you hold a different
15 role?

16 A Yes, prior to confirmation, I was the chief
17 restructuring officer.

18 Q As the CRO, what were your duties, generally?

19 A Generally, they initially started with preparing the
20 company to file for bankruptcy, then oversee the operations
21 and the develop -- the operations as well as the development
22 of a plan of reorganization or plan of liquidation in this
23 instance.

24 Q Exhibit 1, tab A is the plan, if you could take a look
25 at that please.

1 A Big one or little one?

2 UNIDENTIFIED SPEAKER: The big one.

3 THE WITNESS: Yes.

4 BY MS. LEVINE:

5 Q Did you have a role in formulating the plan?

6 A Yes.

7 Q And what was your role?

8 A I provided the overall direction and represented the
9 company in the negotiations that were involved in developing
10 the plan.

11 Q Did you speak to anybody besides your counsel with
12 regard to the formulation of the plan?

13 A Not that I recall.

14 Q So did you have any conversations that weren't
15 privileged with regard to formulation of the plan?

16 A As I recall, all of my conversations were privileges
17 with Ropes & Gray.

18 Q Did you review the third party release? Did you have -
19 - let me do it this way. Did you have a view with regard to
20 whether third party releases should be included in the plan?

21 A They were critical to the plan, yes.

22 Q And what was -- why were they critical to the plan?

23 A There was a couple different factors at play here. One
24 of the larger ones was the existence of a number of claims
25 that we could not quantify and that we needed to resolve.

1 And those were claims from the writers. And these were
2 claims that we needed to resolve in order to get a plan
3 confirmed.

4 The other factors that played into this related to the
5 -- the continued indemnification and protection that the
6 writers would have against a tax on them for work that they
7 did while they were employed or otherwise contracted with
8 Gawker.

9 Q I invite your attention to Section 9.05 of the plan
10 document in front of you. Did you review Section 9.05, the
11 third party release language in the plan before it was filed
12 with the Court?

13 A Yes, I did.

14 Q Did you understand this language to provide third party
15 releases in favor of the writers for contract provided to
16 both of them?

17 MR. ESPER: Objection. Lacks foundation.

18 THE COURT: Well, it's also -- calls for legal
19 conclusion. I guess you could say that's what you thought
20 it was, whether or not that's what it does. Of course,
21 there are a lot of exclusions in it also, limitations.

22 MR. ESPER: I also --

23 MS. LEVINE: Just asking --

24 MR. ESPER: Your Honor, I would also argue it lacks
25 foundation because of what he just testified. Where would

1 he get that knowledge except from (indiscernible)?

2 THE COURT: No, it's as if she's waiving the
3 attorney/client privilege.

4 MS. LEVINE: Your Honor, I'm just asking if he
5 reviewed it and if he has a view about it.

6 THE COURT: A view what it means? Isn't that what
7 I'm supposed to do?

8 THE WITNESS: Yes.

9 THE COURT: Why don't you ask the -- answer the
10 first one. Did you review it?

11 MS. LEVINE: Was your intent --

12 THE WITNESS: Yes, I reviewed the language in 9.05.

13 BY MS. LEVINE:

14 Q Was it your intent to have the third party release
15 language release the writers?

16 A My intent and direction, which I gave to Ropes & Gray -
17 -

18 MR. ESPER: Objection, Your Honor.

19 THE COURT: He's -- you know, if he's going to
20 testify to his communications with Ropes & Gray, he's going
21 to open it up.

22 BY MS. LEVINE:

23 Q I'm just asking your intent. I'm not asking what your
24 conversations were with counsel.

25 A My intent was to get the broadest release possible.

1 THE COURT: I don't think that's really a question
2 in the case. It's certainly clear that the debtor wanted to
3 release -- get a lease for the other writers to deal with
4 these indemnity claims, which you would otherwise have to
5 estimate and presumably reserve for.

6 MS. LEVINE: Your Honor, can I have a five minute
7 break?

8 THE COURT: Five? We just broke for five minutes.

9 MS. LEVINE: Two seconds.

10 THE COURT: Two seconds is short. Okay.

11 (Pause)

12 THE COURT: (Indiscernible), would you ask her to
13 come in and -- thank you.

14 MS. LEVINE: Sorry, Your Honor. Thank you.

15 THE COURT: Okay.

16 BY MS. LEVINE:

17 Q Mr. Holden, were you aware of the demand letters sent
18 by Trump prior to confirmation?

19 A Yes, I was.

20 Q And did you get a demand letter from R.J. Balas prior
21 to confirmation?

22 A Yes, we did.

23 Q And what was your understanding of the nature of the
24 claims that were being asserted in those letters?

25 A I recall a demand for a retraction and apology, or an

1 ability to have RJ Bell write something at the bottom of the
2 article. The -- it was -- there was definitely claims of
3 defamation and hurting their business because we had written
4 some of these articles.

5 Q Did -- specifically, do you recall the nature of the
6 claims asserted by Trump? Was that a defamation claim as
7 well?

8 A The claim by Trump was -- I can't remember or I'm not a
9 lawyer enough to know whether or not defamation has a
10 technical sort of threshold or a limit. We were being told
11 to remove articles about his hairdresser and the
12 relationship that he had with his hairdresser.

13 Q And why did he want those removed?

14 A I believe that they were unflattering or I don't
15 remember if there was claims that they were untrue. So the
16 specifics behind it I'm unaware of. I can't recall.

17 MS. LEVINE: Thank you. No further questions, Your
18 Honor.

19 THE COURT: Any cross-examination?

20 CROSS-EXAMINATION

21 BY MR. ESPER:

22 Q Mr. Holden, is it fair to say that in doing your job,
23 you sought the broadest release possible that would still
24 result in a confirmable plan?

25 A That is accurate.

1 Q Okay. You have no independent knowledge of what
2 "deemed to have receive distributions" meant other than
3 whatever communications you might have had with your
4 lawyers, is that correct?

5 A There is a plain language element here which I relied
6 upon in terms of understanding what it means to be deemed to
7 do something.

8 Q Okay. But other than your personal interpretation and
9 whatever discussions you had with your lawyers, you have no
10 other information about what that term means, correct?

11 A It's a term that's used in accounting frequently.

12 Q Well, okay. What does it mean in accounting?

13 A You can deem a dividend in accounting, which basically
14 sets the funds aside for legal purposes. The receiver can -
15 - the receiver of the dividend basically can, for legal and
16 tax purposes, say that they've actually received it even
17 though the cash has not necessarily hit their bank account.

18 Q Is that the only symbol or use of the term deem that
19 you're familiar of in the accounting world?

20 A I'm sure there must be others. It's a pretty large
21 body of work.

22 Q But that's the one you had in mind when you said in the
23 accounting world where deemed is used?

24 A Sorry, repeat the question, sir.

25 Q I asked you about 9.05 and deemed to have received a

1 distribution and sources of your knowledge. And I said
2 exclude attorneys, and I said obviously you have a personal
3 belief based on the plain language. I said are there any
4 other sources you have and draw on for knowledge of what the
5 term means. You said accounting. I'm just trying to finish
6 up exploring that. You cited this one instance in
7 accounting where the term deemed is used. Do you have any
8 other instances in accounting that -- from your mind that
9 you were drawing on for the answer to my question?

10 A That is the only immediate one that I can recall right
11 now.

12 Q Okay. And do you have to -- did you have any
13 communications with anyone other than your lawyers as to
14 what the meaning of the term gross negligence or willful
15 misconduct was?

16 A I do not recall.

17 MR. ESPER: Okay. No further questions.

18 THE COURT: Thank you. You can step down. Do you
19 have any further witnesses?

20 MS. LEVINE: Your Honor, just brief redirect.

21 THE COURT: Sure, I'm sorry. Go ahead.

22 REDIRECT EXAMINATION

23 BY MS. LEVINE:

24 Q Mr. Holden, just to refresh your recollection, do you
25 recall being deposed in this case?

1 A Yes.

2 Q And do you recall being asked during that deposition if
3 you were deemed -- what your understanding was of deemed to
4 have received a distribution?

5 A Yes.

6 MR. ESPER: Your Honor, I object. This is their
7 witness and they're impeaching him.

8 MS. LEVINE: Well, actually, Your Honor, we're back
9 and forth on cross because he's their witness as well.

10 THE COURT: That's true and I suppose she's
11 refreshing his recollection about what deemed to be received
12 means.

13 MS. LEVINE: Your Honor, with the Court's
14 permission, I'd like to show Mr. Holden a portion of his
15 deposition transcript and ask him to --

16 THE COURT: Why did you just ask him whether he was
17 asked that question and gave that answer?

18 MR. ESPER: May I have a page cite quickly?

19 MS. LEVINE: Page 23.

20 MR. ESPER: Thank you.

21 MS. LEVINE: Line 19 through page 24, line 13.

22 THE WITNESS: Which exhibit, sorry? I apologize.
23 It's not in the exhibit --

24 BY MS. LEVINE:

25 Q Okay. So, starting on page 23. Actually, I'll go back

1 to line ten.

2 Did you form any belief as to what the words deemed to
3 receive a distribution meant?

4 Answer: Form any, I don't understand what you mean by
5 formed any belief.

6 In other words, do you know what that term means?

7 Yes, I do.

8 What does the term mean?

9 That terms means if you had any participation in the
10 bankruptcy process. If you had sent us a letter at some
11 point, if you filed a claim, if you had poked your head up
12 in any respect or capacity, you had the opportunity file a
13 claim and that claim resulted in adjudicated or had any
14 option to say -- not to file the claim which is the
15 equivalent of saying that you have a zero claim.

16 If you have a zero claim and if you file a claim, if
17 you are claimed, our bankruptcy paid a hundred cents on the
18 dollar to every claim that was filed. Every claim that was
19 not filed, they got a hundred cents on nothing because they
20 didn't file it -- I'm paraphrasing, for which they filed,
21 they are deemed to have received consideration.

22 A Can I -- and --

23 MS. LEVINE: May I show him the --

24 THE COURT: Yes. Sure.

25 THE WITNESS: I reviewed this last night. The

1 question that I believe that I was asked was; excluding
2 conversations that I've had with my lawyer; did I form any
3 belief.

4 This -- what's represented here is what we talked
5 about extensively between Ropes and I and I don't know if
6 I'm opening up unnecessary discussions.

7 But this was all --

8 MR. ESPER: Your Honor, may I make a motion to
9 strike? The very next question at the deposition asked for
10 all sorts of knowledge and he says his lawyers.

11 THE COURT: Ms. Levine.

12 MR. ESPER: Question: What is the -- and what's
13 the basis for your belief that this is what it -- this
14 means? This is page 24, line 14.

15 Ms. Bierut: I'll caution the witness not to
16 disclose any privileged conversations he might have had with
17 counsel.

18 Answer: I relied on my counsel.

19 THE COURT: Look. I'm going to sustain the motion
20 to strike. Maybe the question about foundation should have
21 been asked first at the deposition and he never would have
22 given that answer.

23 Mr. Gilardi has testified. It sounds to me like
24 he really doesn't have any knowledge outside of what counsel
25 may have discussed with him.

1 Do you have any other questions of the witness?

2 MS. LEVINE: No, Your Honor.

3 THE COURT: You can step down. Thank you.

4 Do you have any other witnesses?

5 MS. LEVINE: No, Your Honor.

6 THE COURT: Do you have any other witnesses?

7 MR. ESPER: We rest.

8 THE COURT: All right. Let me ask -- I want to
9 ask a question before -- one of the requirements for being
10 the beneficiary of the release is to vote in favor of the
11 plan and to waive any claims for indemnity against the
12 estate.

13 Is there any dispute that Mr. Goldberg satisfied
14 those conditions? Mr. Esper?

15 MR. ESPER: I have no evidence to the contrary.

16 THE COURT: Well, that's not quite the answer to
17 the question.

18 MR. ESPER: Well, Your Honor, I'm not necessarily
19 aware of the evidentiary record about -- in the --

20 THE COURT: His note is reflected in the book,
21 that balance certification. And I can take judicial notice
22 of that. You know, I don't know if I could take judicial
23 notice of it for the truth and I can reopen the record. But
24 I'm just trying to clear out those issues.

25 MR. ESPER: Yeah. Well, lacking independent

1 knowledge, I have no objection to the Court judicially
2 noticing whatever --

3 THE COURT: Okay.

4 MR. ESPER: -- his -- Mr. Goldberg's action was
5 with respect to that.

6 THE COURT: That doesn't tell me about the waiver
7 though although there is a finding in the confirmation order
8 that the writers waived their claims against the estate.

9 MS. LEVINE: Your Honor, two points. First,
10 Mr. Goldberg did vote in favor of the plan and that's part
11 of the record.

12 And, second, there was a stipulation that was
13 entered following confirmation pursuant to which all of the
14 writers who did vote in favor of the plan also withdrew
15 their indemnification (indiscernible).

16 THE COURT: Is there any dispute?

17 MR. ESPER: There's no dispute.

18 THE COURT: Okay. I had raised two issues, two
19 potential -- two ambiguities when we had an earlier
20 conference relating to the scope of the release.

21 The first one, which there wasn't really much
22 evidence on, is what did willful misconduct and gross
23 negligence exclude? But then I went back. There was a
24 colloquy at the confirmation hearing and then I went back
25 and I looked at the findings in the confirmation order and

1 there's a specific finding that the claims and causes of
2 action covered by the third-party releases are based on
3 conduct for which the debtor might be liable with debtor
4 indemnification obligations.

5 Since the -- there's a part of the stipulated
6 facts is that the debtor indemnify defamation claims and
7 related claims arising from publication of materials.

8 I'm satisfied that, notwithstanding the willful
9 misconduct, gross negligence exclusion, that the defamation
10 claims are covered by the third-party release.

11 I am still having problems with the language of
12 deemed to be -- received or deemed to receive a
13 distribution.

14 When Mr. Gilardi testified, in his mind, he seemed
15 to make a distinction between that language of binding
16 people who are -- received a distribution or are deemed to
17 receive a distribution as opposed to the more typical
18 language that binds creditors whether or not they file a
19 claim and I just don't understand what that distinction is.

20 In addition -- let me just find that exhibit, it's
21 that Exhibit G. Mr. Patel asked a very straight forward
22 question; what does deemed to be received mean if the third
23 party hasn't filed a claim or a lawsuit? Is that third
24 party deemed to have received a distribution?

25 Mr. Gilardi's answer changes the question

1 somewhat but the answer is clearly negative in that first
2 paragraph and I just don't understand that.

3 MR. ESPER: Your Honor, we actually -- and maybe
4 Mr. Gilardi could testify further if we need to reopen the
5 record, but we took the first paragraph to say that he
6 cannot say that third parties actually received a
7 distribution if they did not file a proof of claim --

8 THE COURT: No, no. I know what it says but
9 that's not the --

10 MR. ESPER: So --

11 THE COURT: -- question that Mr. Patel asked. And
12 that's why I say he changed the question somewhat.
13 Mr. Patel wasn't asking about people who filed claims. He
14 was specifically asking; are you deemed to receive a
15 distribution if you didn't file a lawsuit or a claim? And
16 the response is a little different but it's certainly a
17 negative response.

18 MS. LEVINE: We -- actually we took it as the
19 opposite. In other words, we think that what Mr. Gilardi
20 was saying to us is if you're -- is if you actually received
21 a distribution, it's because you filed a proof of claim.

22 Deemed to have received a distribution has to
23 expand what would happen if you actually received a
24 distribution. So, I cannot say that third parties received
25 a distribution if they did not file a proof of claim.

1 Therefore, I have to use the language, they were deemed to
2 have received a distribution, and we think that makes sense
3 -- we think that makes it --

4 THE COURT: I'm not sure that's what that says.

5 MS. LEVINE: But we think it makes even more
6 sense, Your Honor, if you tie it to the email which
7 Mr. Gilardi probably sent only a few seconds later which
8 said; heads up. We're going to modify to include a release
9 for not only people who received distributions under the
10 plan but also from those who do not; which is what he sent
11 to the creditors' committee at -- immediate --

12 THE COURT: Where is that? Which exhibit?

13 MS. LEVINE: That's Goldberg Exhibit 3.

14 (Pause)

15 THE COURT: That doesn't really answer the
16 question. Well, maybe you can clarify it in the proposed
17 findings of the fact. But I just don't understand the
18 distinction that's being made here.

19 If it simply said, you're bound if you're a
20 creditor whether or not you filed a proof of claim, which is
21 what plans usually say and essentially what 9.02 says, I
22 would understand what that means.

23 But I don't -- and it's essentially the same
24 language if I'm going to let (indiscernible) you want it to
25 (indiscernible) but I just -- it's a very --

1 MS. LEVINE: Your Honor, we're not disagreeing
2 that there's some ambiguity here. We're not disagreeing --
3 well, you know, we're admitting that it was a very difficult
4 negotiation and I think Mr. Gilardi testified that part of
5 his concern was he sort of got to a certain place with the
6 United States Trustee's Office with regard to what he viewed
7 as third-party releases that would protect the writers and
8 that therefore he thought this language was substantially
9 similar enough, was -- to the language in the injunction,
10 that it would cover folks whether or not they actually got
11 paid a distribution or simply asserted a claim or chose not
12 to assert a claim and therefore did not get paid a
13 distribution but should be deemed to have been paid a
14 distribution because this was, for all intents and purposes,
15 if you asserted a claim and it was allowed, you got paid a
16 hundred cents on the dollar.

17 THE COURT: The only evidence though regarding
18 Mr. Gilardi's communications with the U.S. Trustee is the
19 U.S. Trustee's concern that the plan include an exclusion
20 for willful and -- willful misconduct and gross negligence.
21 We've gotten past that.

22 The U.S. Trustee wasn't concerned with whether
23 creditors who filed a claim or didn't file a claim will be
24 deemed to receive a distribution or didn't receive a
25 distribution were covered by the release. That's not the

1 concern of the U.S. Trustee generally.

2 MS. LEVINE: Correct, Your Honor. But at the
3 confirmation hearing part of the colloquy that Mr. Gilardi
4 had with the Court was over this exact issue with regard to
5 the particular example of the Trump claim --

6 THE COURT: Uh-huh.

7 MS. LEVINE: -- which was similar to here, a
8 demand letter that basically said I'm mad at you for doing
9 this stuff and Mr. Gilardi specifically explained that that
10 is exactly the type of claim where we don't want somebody to
11 lie in wait, let the bankruptcy pass and then just go after
12 these innocent victim writers who only are in the situation
13 because they submitted content to Gawker. It was reviewed
14 and posted.

15 In other words, we're not talking about which is
16 what we would interpret willful misconduct to be. We're not
17 talking about somebody doing something, like posting
18 secret --

19 THE COURT: Well, we're past willful misconduct
20 and I separate that --

21 MS. LEVINE: No. But my --

22 THE COURT: -- from the other exclusion which is
23 received or deemed to receive a --

24 MS. LEVINE: Right. But the -- but the point
25 being he -- the goal, as explained through the Trump

1 example, was to protect the writers from content properly
2 provided to Gawker and posted to the website and that was, I
3 believe, the reason for the specific use of the Trump
4 example at the time of the confirmation hearing.

5 THE COURT: Okay. Thank you.

6 MR. ESPER: Your Honor, I would say that I have a
7 different view of the evidence.

8 First of all, I do want to say, just for the
9 record, I mean, I want to be helpful to the Court and focus
10 on what the Court's interested in.

11 Obviously, we have a different view of gross
12 negligence and willful misconduct.

13 THE COURT: No. I understand but there's a
14 finding in the confirmation order in terms of the types of
15 claims that were being released and I won't entertain a
16 collateral attack on the confirmation order at this point.

17 MR. ESPER: No. I -- as I said, I accept that. I
18 wanted to note our position for the record.

19 THE COURT: Okay.

20 MR. ESPER: But the point here is to try and be
21 helpful to the Court, not to rehash issues where the Court
22 is not interested in hearing further argument. So, I want
23 to focus on what the Court does want argued and that is the
24 deemed to have received distribution issue.

25 And my view of the evidence is as follows. I

1 think that Mr. Gilardi and Mr. Holden both made clear that
2 there were two issues here.

3 On the one hand, you had these writers, and they
4 clearly, the writers clearly wanted a stronger release of
5 their -- or claims against them as possible. There's no
6 doubt about that. They made their position clear a number
7 of times and, you know, part of why we're here is, you know,
8 Mr. Patel and Ms. Levine make that position very clear even
9 in this hearing. They want the strongest possible release
10 and we understand that.

11 But there was another goal here. The other goal
12 was to get a plan confirmed, to not draw any -- draw any
13 flap from the Trustee; to not draw any flap from the
14 creditors' committee; to not draw any flap from Your Honor.
15 And to get a plan confirmed, get claims paid, get releases
16 entered et cetera.

17 And Mr. Gilardi had both of those goals in mind.
18 He has the writers on the one hand saying, get us a broad
19 release but has his imperatives to get a plan confirmed on
20 the other hand.

21 And, quite honestly, I think what happened here is
22 that Mr. Gilardi made a strategic choice. A strategic
23 choice not to put in clear language into the agreement,
24 release -- into the plan releasing all claims against third
25 parties because such language might very well be rejected by

1 the Court, might very well have drawn an objection from the
2 U.S. Trustee et cetera.

3 So, instead, Mr. Gilardi made a strategic choice
4 to put something vague in there, to put something ambiguous
5 in there, that might be later construed -- that he hoped
6 might be later construed. But he didn't express this hope
7 to anyone. He didn't discuss at any time with anybody that,
8 in fact, what was going to happen was this release was, in
9 fact, going to bar -- he didn't go and call the Trustee and
10 say, you know --

11 THE COURT: Let me just interrupt you. He did, at
12 least with respect to the Trump claim or a Trump-type claim,
13 make clear at the confirmation hearing what the scope of the
14 release was intended to be and you had notice of that. You
15 could have shown up and said, hey, wait a minute. We don't
16 participate in the case. We should be able to go forward.

17 MR. ESPER: Your Honor, with respect, I think that
18 by the time the confirmation hearing has occurred, first of
19 all, the cake's already been baked. We have the language.
20 The language means what it means.

21 Second of all, it kind of has the same flavor as,
22 for instance, statements on the floor of Congress which are
23 sometimes the worst form of legislative history which it
24 often is the case, it's not somebody saying exactly what the
25 provision does mean. It's somebody saying what they would

1 like to have it mean or even sometimes what it doesn't mean
2 but what they want to put on the record as its meaning in
3 the hope that maybe they can influence an interpretation
4 down the line.

5 I think there is an aspect of -- you know, if you
6 look at Exhibit G and you look at Exhibit H and you look at
7 the communications between Mr. Gilardi and Mr. Patel, what's
8 going on there is essentially the following communication.

9 Mr. Patel: I want you to get the broadest
10 possible release.

11 Mr. Gilardi: If we try for too broad a release,
12 we might get rejected. I can't do that. There might be
13 consideration problems as well which I didn't mention before
14 but that was a concern, too. So, I will do the best I can.

15 Having had that communication, Mr. Gilardi didn't
16 then inform Your Honor about that communication. No. He
17 gets on the -- up at the confirmation hearing and says, no,
18 no, no, no, no. This is -- you know, this is what it's
19 intended to do.

20 But the cake's already baked by that point.
21 They've already had their negotiation, their discussion.
22 They've put it on the record and they've shown that they've
23 made a strategic choice not to go for the homerun. They
24 made a strategic choice to take a single instead.

25 So, getting on to the record at the confirmation

1 hearing and then saying, well, we really hit a home run,
2 Your Honor, is too late.

3 And furthermore, the confirmation hearing, there
4 isn't anybody there representing the interests of non-claim
5 filers.

6 THE COURT: Well, but you had -- forget about
7 anybody else, you had notice of the confirmation hearing,
8 right?

9 MR. ESPER: Yes, we did. But the bottom line is
10 Mr. Gilardi can make any statement he wants on --

11 THE COURT: I guess what you're saying is that you
12 can't use statements of the confirmation hearing to
13 interpret ambiguous language; is that basically what you're
14 saying?

15 MR. ESPER: Yeah. I think it's a unilateral
16 statement and, you know, that is certainly insufficient in
17 this case to cause us to ignore what is the record of what
18 was a strategic choice by Mr. Gilardi.

19 THE COURT: So, what do you think received or
20 deemed to have been received means?

21 MR. ESPER: I think that under contract law at
22 bottom it is -- I believe -- I agree with Your Honor's
23 earlier conclusion in the earlier proceeding that it's
24 ambiguous. That's why we're here.

25 So, now, we have to look at the traditional means

1 of contract interpretation. What does that mean?

2 First of all, as we've had enormous discussion
3 today, it means no subjective understandings. It doesn't
4 matter what Mr. Gilardi thought in his own mind it might
5 mean. It doesn't matter what he'd like it to mean. Only
6 the objective manifestations of intent are important.

7 Second of all, we construe different parts of an
8 instrument together. So, it happens that 3.05 is in the
9 same agreement and uses hauntingly similar language to 9.05.
10 So, we construe them together. That's what you do under
11 contract law.

12 When you construe them together, you get a
13 harmonizing construction which is that if they had deposited
14 money into a reserve with respect to a specific claim, that
15 that claim hadn't been paid out of the reserve yet.
16 Nonetheless, that person is deemed to receive a distribution
17 you can't sue again. His claim is released.

18 That's what it means and that's a perfectly
19 natural interpretation of it. It -- whether or not it was
20 the interpretation that Mr. Gilardi and Mr. Patel secretly
21 hoped for is not relevant. It's a plausible, reasonable
22 interpretation based on the established rules of contract
23 interpretation, not asking for any subjective understanding
24 of people that was unexpressed and based on the terms of the
25 plan. What more can you ask for than that in a contract

1 case?

2 The other thing I want to mention is there is one
3 other piece of evidence that I think sheds some light on
4 that and that is the bar date order.

5 THE COURT: I know Mr. Flaxer was going to raise
6 this one.

7 MR. ESPER: Well, Your Honor, you probably know
8 what I'm about to say. But in the bar date order it says
9 that persons who do not file a claim shall not be treated as
10 creditors. And this was not only in the order, it was put
11 in the notice as well. So, it went out to the world.

12 If you haven't filed a claim, you're not treated
13 as a creditor.

14 Now, honestly, I have to say, I'm a little careful
15 about this because of the -- if you remember, Mr. Gilardi's
16 testimony, the definition of claim, you know, that the bar
17 date order does honestly refer to what constitutes a
18 creditor rather than who is deemed to receive a
19 distribution.

20 But still harmonizing the bar date order with the
21 plan, it would seem that it is perfectly natural that the
22 plan not treat parties who are not treated as creditors
23 under the bar date order as if they've received
24 distributions under the plan.

25 THE COURT: So, you think under 9.02, if you have

1 a claim and never file it, you're not a creditor bound by
2 9.02, the injunction provision?

3 MR. ESPER: I think the injunction provision does
4 bar anybody who doesn't -- has a claim that's not -- that is
5 released by 9.05 from coming in here. That's the language
6 of 9.02.

7 And I don't think the bar date order can modify
8 that language which is not vague. It's completely clear.

9 But when we have language that is ambiguous, then
10 you can look at the bar date order and say that's of some
11 aid.

12 But, again, I want to emphasize, I really come
13 back to 3.05, the bar date order is very useful evidence but
14 3.05 is using basically the exact same term elsewhere in the
15 plan and that's very strong evidence.

16 THE COURT: Okay. Thank you.

17 MR. ESPER: Thank you, Your Honor.

18 MS. LEVINE: Your Honor, briefly?

19 THE COURT: Very briefly though.

20 MS. LEVINE: Your Honor, with respect to the issue
21 with regard to the oral argument at confirmation not being
22 evidence --

23 THE COURT: An aid to interpretation, I guess, is
24 what he's saying.

25 MS. LEVINE: We would argue that it is an aid to

1 interpretation. We would also respectfully submit that it's
2 consistent with the testimony that we actually heard today
3 from Mr. Gilardi (indiscernible) up on the stand.

4 With regard to the deemed to have received
5 language, if you write the deemed to have received language
6 out of the release which is, in essence, what we're talking
7 about now, in the case of a hundred percent plan, you're, in
8 essence, saying that there is no release and you're
9 rendering it meaningless.

10 And the writers were very afraid that there was
11 the likelihood that there are people who were mad, who were
12 going to come after them, potentially harass them and they
13 would not have an ability economically to defend those
14 lawsuits without the ability to look to either Gawker for
15 indemnification or to a release that would be binding.

16 THE COURT: I understand the concern of the
17 writers. I'm concerned about that phrase which, again, I
18 come back to saying the same thing. Mr. Gilardi apparently
19 perceived the difference between a phrase like that and a
20 phrase that says you're bound, creditors are bound whether
21 or not they filed a claim which, again, is the usual
22 language that you see in the plan. And it's the language
23 that appears in 9.82. Are you saying that they're the same?

24 MS. LEVINE: We understand, Your Honor. We
25 understand the concern but we think the deemed to have

1 received has to have meaning. And, if you take it out, if
2 you only have people who filed proofs of claim, and
3 therefore either had their claim allowed at some number or
4 disallowed, then you're taking out deemed to have received,
5 then it has no meaning.

6 THE COURT: Well, but if the meaning --

7 MS. LEVINE: In addition to that, even if you
8 accept Mr. -- just to --

9 THE COURT: -- the argument --

10 MS. LEVINE: -- just to --

11 THE COURT: Let me finish. The argument is that
12 it has a very clear meaning. You read Section 3.05, you're
13 deemed to receive a distribution if you have a disputed
14 claim and the payment is made to a reserve.

15 MS. LEVINE: We would argue two things with regard
16 that, Your Honor.

17 First of all, actually if you take the argument
18 that if you don't file a claim, then you have no rights
19 under the plan. There has to be a different way other than
20 calling somebody a creditor to bind them to the release.

21 And deemed to have received takes care of the
22 "problem" that is arguably there if they're not deemed a
23 creditor regardless of whether or not they file a proof of
24 claim under the bar date order.

25 THE COURT: Well, we're going a little -- the head

1 of the discharge provisions of Chapter 11 deal with that
2 situation.

3 MS. LEVINE: And, in addition to that, Your Honor,
4 with regard to the different use of deemed to have received
5 for tax purposes, it's not uncommon, Your Honor, for
6 something to have a specific meaning for the IRS Code and
7 for tax purposes than for the release provisions.

8 And if Your Honor interprets deemed to have
9 received to mean only those monies that were deposited into
10 the reserve accounts, again, we're reaching the -- we're
11 reaching the conclusion where the deemed to have received
12 language is, in essence, written out of the release because
13 the payments that are made are paid only to creditors, all
14 of whom received a hundred percent distribution and would
15 not otherwise have claims against the writers.

16 So, that can't possibly be the interpretation.

17 Also, Your Honor, under 9.02, if you accept
18 R.J. Bell's interpretation --

19 THE COURT: But people who deemed to have received
20 with unfiled claims aren't receiving any distribution,
21 right?

22 MS. LEVINE: But that -- which is exactly the
23 point, Your Honor. In other words, if you don't file a
24 proof of claim and you don't get a distribution and you just
25 lie in wait, as this circumstances and other lawsuits that

1 we're starting to see happen, that only the writers are
2 getting sued without the benefit now of the indemnification
3 that they would have gotten from Gawker.

4 In addition to that, Your Honor, under 9.02 --
5 under 9.02, if deemed to have received is confusing, and we
6 believe that it is, the appropriate course of action for
7 R.J. Bell would have been to come here first before hoping
8 that if they filed suit, they would just intimidate the
9 writers in order to have Your Honor --

10 THE COURT: Well -- (indiscernible) on a decision
11 in this case. State Court could presumably have interpreted
12 it also.

13 MS. LEVINE: Your Honor, we respectfully submit
14 that that's part of the issue that we're grappling with
15 here. The writers provided the content. The content
16 provided the value. The goal here was to protect the
17 writers with the release.

18 Obviously, we have a situation with some ambiguity
19 in the documentation.

20 But to come back to the Court that entered the
21 confirmation order was the hope under the injunction and
22 to --

23 THE COURT: I understand that but how does that
24 affect the decision in the case? So, they didn't come here
25 first. Mr. Goldberg came here.

1 But how does that answer any of the questions that
2 are raised?

3 MS. LEVINE: Your Honor, we think it provides some
4 further -- it highlights the issue of writing deemed to have
5 received out of the release because what we're finding is
6 these cases are getting filed in State Court and unless the
7 writers then assume both the burden of defending those
8 litigations and coming back to this Court, they're in
9 exactly the place the parties had hoped to avoid by putting
10 the third-party releases in the -- into the plan.

11 So, I hear Your Honor that the --

12 THE COURT: But the third-party releases don't
13 stop the lawsuit. They may ultimately prevail in the course
14 of them but they might have to defend based upon either the
15 injunction or the third-party release.

16 It doesn't mean no lawsuits are filed. They may
17 ultimately be dismissed because of -- you know, because of
18 the releases. It was the situation with the Gizmodo issue
19 on the sale order.

20 All right. Look. Why don't we do this?

21 As I said, I've resolved the issue with the
22 willful misconducts and gross negligence issue. I think
23 that's covered by paragraph 21 of the confirmation order.
24 The confirmation order is res judicata and I'm not inclined
25 to entertain a collateral attack on that finding.

1 That's the kind of claim that was -- that is
2 excluded under the third-party releases.

3 I will have an issue with what this deemed to
4 receive means.

5 As I said, Mr. Gilardi testified that there's a
6 difference between that and barring all creditors, whether
7 or not they filed a claim.

8 There's an element here of kind of a purposeful
9 ambiguity in order to get the plan through.

10 You know, I -- and this thing about the tax issue,
11 you may be right. It's just you're talking about two
12 different things. One, you're talking about a third-party
13 release and, the other, you're talking about tax liability.

14 But I still have that issue. So, I'll entertain
15 proposed findings of fact and conclusions of law. You can
16 include the issue, just the completeness on willful
17 misconduct and gross negligence and, you know, point out
18 that the Court already found in paragraph 21 that's what the
19 release, the third-party release reaches.

20 MR. ESPER: Your Honor, I just -- I'll probably
21 file something that goes along with your finding on that.
22 So, in other words, the proposed findings will include those
23 findings in their favor on the gross negligence. I just
24 want to state for the record --

25 THE COURT: Well, if you don't, they will. So, it

1 doesn't matter.

2 MR. ESPER: Yeah. I just want to state that if I
3 do file that, I would, obviously, reserve any -- whatever
4 rights we have.

5 THE COURT: I understand. What I'll ask you to do
6 is I guess Mr. Goldberg will file the first proposed
7 findings. How long will it take you to do that?

8 MR. PATEL: Two weeks, Your Honor.

9 THE COURT: Two weeks from today.

10 When you file your proposed findings, also you can
11 email to chambers a copy of the proposed findings in Word
12 format. Every proposed finding, by the way, has to have a
13 reference to the record unless it's a fair inference from
14 what preceded it with a reference.

15 MS. LEVINE: Your Honor, could we just amend that
16 to two weeks from the day we get the transcript?

17 THE COURT: I don't know when you're going to get
18 the transcript. It's only a two-hour trial.

19 MS. LEVINE: Okay. Just in order -- in case -- a
20 lot of it's going to come from Mr. Gilardi's testimony. I
21 don't want to misquote it.

22 THE COURT: How about two weeks from Wednesday?
23 Today's Monday.

24 MS. LEVINE: Okay.

25 THE COURT: So, that's two weeks from the 11th.

1 It's the 25th.

2 I'll give you two weeks to answer from the 25th,
3 whatever that date is.

4 MR. ESPER: That's May 9th, I believe.

5 THE COURT: How could it be May -- May 9th? Okay.
6 And then I'll give you a week to replay.

7 You don't have to repeat your arguments in the
8 reply. Just --

9 MR. ESPER: May 16th.

10 THE COURT: May 16th. Okay.

11 No. That can't be. That's at least three weeks.

12 What's fourteen day -- fourteen days after
13 April 25th is May -- 9th -- which is May 8th, right?

14 MR. ESPER: It's May 9.

15 THE COURT: You said May 16th.

16 MR. ESPER: No. May 16th for the reply.

17 THE COURT: Oh, okay. And --

18 MR. ESPER: April 25th, May 9th, May 16th.

19 THE COURT: Same issue with you. Email a copy of
20 the -- your proposed findings in Word format. Every
21 paragraph should have a reference to the record.

22 And also if you can give me on a disk the exhibits
23 you are citing or the exhibits you're relying on and not
24 just one -- you know, one insert of a hundred and fifty
25 pages. Separate them by exhibits.

1 All right. Thank you very much. That's it.
2 (Whereupon these proceedings were concluded at 12:28
3 p.m.)
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I N D E X

T E S T I M O N Y

PLAINTIFF'S

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William Holden	Ms. Levine	70
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	Ms. Levine	77

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C E R T I F I C A T I O N

I, Dawn South, certify that the foregoing transcript is a true and accurate record of the proceedings.

Dawn South

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